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No. 05-

IN THE

Supreme Court of the United States

JEROME KOSOY, M.D., BEAUTIQUE, INC., DISCOVERY SERVICES OF TEXAS, INC., and JEFFREY K. MUSKER, D.C., ("CHAIR KING"),

Petitioners,

v.

GTE MOBILNET and CHICK-FIL-A, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 1991, Congress enacted the Telephone Consumer Protection Act (TCPA) in part to address the increasing proliferation of junk faxes – unwanted advertisements being sent to private fax machines, costing the recipients time, ink, and paper. The TCPA created a private cause of action enforceable in an appropriate State court "if otherwise permitted by the laws or rules of court of a State." State and federal court have now adopted three sharply conflicting conclusions over whether this language relieves states courts from their obligation under the Supremacy Clause to hear TCPA claims: (1) No, (2) No, unless a state passes a statute or rule of court opting out, and (3) Yes, states have no obligation to enforce the TCPA

The lower courts are also split over whether the "if otherwise permitted" language allows state courts to borrow state limitations law and apply it to the TCPA rather than applying the federal residual statute of limitations.

1. Whether Congress by the language "if otherwise permitted by the laws or rules of court of a State," relieved state courts of general jurisdiction of their obligation under the Supremacy Clause to hear TCPA claims unless and until such state passes a law or a rule of court specifically authorizing claimants to bring TCPA claims in that state's courts.

2. If Congress delegated to the states the power to determine whether to enforce a federally–created right, either by state legislation or rules of court, would this delegation be unconstitutional under the Supremacy Clause or the Tenth Amendment, or inconsistent with modern notions of federalism?

3. Whether states that entertain TCPA actions can refuse to apply the four-year federal residual statute of limitations, which applies to all federal actions enacted after 28 U.S.C. § 1658 "[e]xcept as otherwise provided by law," to the TCPA's private action, which was enacted by Congress after § 1658 and does not otherwise provide a limitations period.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, the corporate Petitioners state that they have no parent companies and no publicly held corporation owns 10% or more of the stock of any such corporate Petitioner.

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JURISDICTION

The Texas Supreme Court rendered its judgment and issued its opinion on February 3, 2006. No motion for rehearing was filed. The jurisdiction of this Court is properly invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the Constitution provides in relevant part that "[T]he Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2.

The TCPA makes it illegal to "use any telephone facsimile machines, computer or other device to send an unsolicited advertisement to a telephone facsimile machine." 47 U.S.C. § 227(b)(1)(C).

Section 227(b)(3) provides a private right of action for violations of this section:

> **Private right of action**. A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State—
>
> > (A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violations,
> >
> > (B) an action to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater, or
> >
> > (C) both such actions.

47 U.S.C. § 227(b)(3).

The federal residual limitations statute, 28 U.S.C. § 1658, provides:

> Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues.

28 U.S.C. § 1658.

STATEMENT OF FACTS

1. Congress enacted the TCPA to eliminate unsolicited facsimile advertising.

In 1991, to address a growing number of consumer complaints about the use of automated telephone equipment to make unsolicited telephone calls and to send unsolicited facsimiles advertising goods and services, Congress enacted the TCPA by amending the Communications Act of 1934. Pub. L. No. 102-243, 105 Stat. 2394 (codified as amended at 47 U.S.C. § 227). The TCPA prohibits individuals and businesses from using a facsimile machine to send unsolicited facsimile advertisements to another facsimile machine without first obtaining the recipient's consent. 47 U.S.C. § 227(b)(1)(C). It also creates a private cause of action for any violation and provides a fixed damage remedy. *Id.* § 227(b)(3). The TCPA's purpose is to "protect the privacy interests of residential telephone subscribers by placing restrictions on unsolicited, automated telephone calls . . . and to facilitate interstate commerce by restricting certain uses of facsimile (fax) machines and automatic dialers." S. Rep. No. 102-178, at 1 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968.

Congress vested original jurisdiction over TCPA claims in state courts. *Int'l Science & Tech. Inst., Inc. v. Inacom Commc'ns, Inc.*, 106 F.3d 1146, 1156 (4th Cir. 1997). The TCPA's private cause of action may be brought in an appropriate state court *if otherwise permitted by the laws of a State or the rules of court of a State*. 47 U.S.C. § 227(b)(3). Federal and state courts have interpreted this phrase in three different, but inconsistent ways, two of which raise constitutional implications:

1. *Acknowledgement*: The TCPA acknowledges the constitutional principle that states have the right to structure their own court systems to accept claims based on federal law and that state courts are not obligated to change their procedural rules to accommodate federal claims such as the TCPA. Six states have adopted this interpretation. *See infra*, p. 9.

2. *Opt-out*: The TCPA permits states to enact legislation or a rule of court declining to enforce TCPA claims altogether, but unless such affirmative action is taken, aggrieved parties may bring TCPA claims in state courts of general jurisdiction. Six states have adopted this interpretation. *See infra*, p. 10.

3. *Opt-in*: The TCPA requires states to enact legislation or a rule of court "activating" the TCPA before aggrieved parties may assert claims for violations of the statute. Only Texas has adopted this interpretation. *See infra*, p. 10.

2. 28 U.S.C. § 1658, the federal residual limitations statute.

This case also concerns the issue of whether and how to apply the four-year residual limitations period set forth in 28 U.S.C. § 1658. Enacted on December 1, 1990, section 1658 provides a four-year limitations period for any claim arising under a federal statute enacted after 1990 that has no limitations period. 28 U.S.C. § 1658. The TCPA falls squarely under the statute, as it was enacted after section 1658 and

has no limitations period. *See* 47 U.S.C. § 227 *et seq.* The Texas Fourteenth Court of Appeals held that section 1658 does not apply to the TCPA because states are allowed to apply their own limitation periods to TCPA claims. *Chair King, Inc. v. GTE Mobilnet of Houston, Inc.*, 135 S.W.3d 365 (Tex. App. – Houston [14th Dist.] 2004), *rev'd*, 49 Tex. Sup. Ct. J. 336, 2006 Tex. LEXIS 97, (Tex. Feb. 3, 2006). The court held that because states have exclusive jurisdiction over private TCPA claims and have the power to accept the claims pursuant to their laws and rules of court, Congress intended that state courts borrow state limitation periods under section 1658's "except as otherwise provided by law" language. *Id.* The Texas Supreme Court declined to reach this issue because its primary holding – that there is no maintainable private cause of action in Texas courts under the TCPA – was dispositive. *Chair King, Inc. v. GTE Mobilnet of Houston, Inc.*, 49 Tex. Sup. Ct. J. 336, 2006 Tex. LEXIS 97, (Tex. Feb. 3, 2006).[1]

3. The history of this case.

From as early as 1992, Petitioners (collectively "Chair King")[2] received thousands of unsolicited fax ads over their machines without permission. (App. at 3a). After Chair King filed suit against GTE and Chick-Fil-A alleging violations

1. This case was recently reported at *Chair King, Inc. v. GTE Mobilnet of Houston, Inc.*, 184 S.W.3d 707 (Tex. 2006).

2. Although Chair King is no longer a party because the Court of Appeals dismissed its claims, (App. at 81a, 87a-88a), the Petitioners have collectively gone by this name throughout the court process and are referred to as such in the appellate court decisions complained about here. Thus, to maintain consistency, Petitioners will continue to refer to themselves as Chair King.

of the TCPA, GTE and Chick-Fil-A filed motions for summary judgment arguing that Chair King could not bring suit under the TCPA because the statute's language "if otherwise permitted by the laws or rules of court of a State" required that Texas first "opt-in" to the federal statute before a claimant could bring a TCPA claim. (App. at 4a). GTE and Chick-Fil-A also moved for summary judgment based on limitations, arguing that Texas' two-year limitations period applied to the TCPA. (App. at 4a). Chair King argued the acknowledgement theory, with the "opt-out" theory as an alternative. (App. at 9a). The trial court rendered judgment against Chair King in an order signed March 7, 2000. (App. at 89a).[3]

Chair King appealed to the Fourteenth Court of Appeals of Texas, arguing in part that it was a violation of the Supremacy Clause for the trial court not to enforce the TCPA. (App. at 56a-57a). The court of appeals reversed the trial court's judgment as to GTE, holding that the TCPA did not require states to "opt-in" to the federal legislation before enforcing the statute. (App. at 52a). Chair King also argued that 28 U.S.C. § 1658 supplied a four-year statute of limitations. (App. at. 73a-77a). The appellate court affirmed the judgment as to Chick-Fil-A based on its opinion that Texas' two-year limitations period applied to the TCPA rather than the four-year period provided for in 28 U.S.C. § 1658. (App. at 77a). The court of appeals remanded the case against GTE but rendered judgment in favor of Chick-Fil-A. (App. at 88a-89a).

Chair King filed a Petition for Review in the Texas Supreme Court seeking review of the appellate court's

3. Chair King brought suit against other parties and settled those claims before the appeal. (App. at 4a).

affirmance of Chick-Fil-A's summary judgment on the limitations issue, and GTE filed a Petition for Review seeking review of the appellate court's reversal of GTE's summary judgment on the opt-in issue. (App. at 4a-5a). Chair King argued in favor of the acknowledgement or opt-out view and argued that opt-in would be unconstitutional. (App. 9a-11a). The Texas Supreme Court granted both petitions and on February 3, 2006, reversed the court of appeals' judgment and rendered judgment that Chair King take nothing against either Defendant. (App. at 25a). In its opinion, the court held that states are required to enact their own legislation enabling the federal law before citizens may bring claims under the TCPA, and that because Texas had not done so when GTE and Chick-Fil-A violated the statute, Chair King had no cause of action against them. (*Id.*) The Court declined to address the limitations issue. (*Id.*)

REASONS FOR GRANTING THE PETITION

I. This Court should resolve the split in state and federal courts over whether TCPA claims can be brought in state court in the absence of "enabling" legislation or rules of court.

This case involves a state court determination that interprets a federal law, the TCPA, 47 U.S.C. § 227 *et seq.*, an issue within this Court's jurisdiction. 28 U.S.C. § 1257(a); *Oregon v. Guzek*, 126 S. Ct. 1226, 1229 (2006). The decision below ascribes to Congress an intention to delegate to state legislatures and rule-making bodies the authority to decide whether their courts will entertain TCPA claims, an interpretation that raises serious Supremacy Clause and

federalism concerns.[4] The Texas Supreme Court is the first and only state high court to interpret the TCPA as requiring that states "opt-in" to the statute's enforcement before claims may be brought for TCPA violations. The decisions of other state and federal courts are in conflict, and are contrary to the decision challenged here.

Review of this case will afford the Court an opportunity to resolve the conflict over this federal law that has arisen from state courts' and federal courts' inconsistent interpretations of the TCPA and also to determine to what extent states are required to enforce this federal law under the Supremacy Clause and to what extent federalism principles are disturbed by the TCPA's scheme. *See Tafflin v. Levitt*, 493 U.S. 455, 460-61 (1990). For over ten years now, state and federal courts have struggled in construing the enforceability of the TCPA in state courts. Unfortunately, this analysis has not produced a harmonious application of the TCPA; instead, the courts' various interpretations are now in direct conflict. Therefore, the issue is ripe for this Court's decision.

A. A conflict exists between the highest courts of two or more states on a question of federal law.

This Court has previously granted certiorari in cases that present a conflict in decisions of the highest courts of two or more states on a federal question. *See* SUP. CT. R. 10(b); *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 780 n.10 (1981). Here, the highest courts and intermediate appellate courts of several states have split over

4. Robert R. Biggerstaff, *State Courts and the Telephone Consumer Protection Act of 1991: Must States Opt-In? Can States Opt-Out?*, 33 CONN. L. REV. 407 (2001).

whether states are required by the Supremacy Clause to enforce TCPA claims or whether they can reject these claims until a law or rule of court is enacted that "enables" the federal law. As discussed *supra* at 3-4, courts have interpreted the TCPA's phrase "if otherwise permitted by the laws of a state or rules of court of a state" in three ways:

Acknowledgement (6 states and 1 federal court):

Colorado – *Consumer Crusade v. Affordable Health Care Solutions*, 121 P.3d 350 (Colo. Ct. App. 2005, no writ);

Florida – *Condon v. Office Depot, Inc.*, 855 So.2d 644 (Fla. Dist. Ct. App. 2003, no writ);

Georgia – *Hooters of Augusta, Inc. v. Nicholson*, 537 S.E.2d 468 (Ga. App. 2000, writ denied);

Maryland – *R.A. Ponte Architects, Ltd. v. Investors' Alert, Inc.*, 857 A.2d 1 (Md. 2004, no writ);

New Jersey – *Zelma v. Market U.S.A.*, 778 A.2d 591 (N.J. Super. Ct. App. Div. 2001, no writ);

New York – *Schulman v. Chase Manhattan Bank*, 710 N.Y.S.2d 368 (N.Y. App. Div. 2000, no writ);

Federal District Court – *Accounting Outsourcing, LLC v. Verizon Wireless Personal Commc'ns*, 329 F. Supp. 2d 789, 802 (M.D. La. 2004, no writ);

Opt-out (6 states and 1 federal court):

Alabama – *Lary v. Flasch Business Consulting*, 878 So.2d 1158 (Ala. Civ. App. 2003, no writ);

California – *Kaufman v. ACS Sys. Inc.*, 110 Cal. App. 4th 886, 2 Cal. Rptr. 3d 296 (Cal. Ct. App. 2003, pet. denied);

Massachusetts – *Mulhern v. MacLeod*, 808 N.E.2d 778 (Mass. 2004, no writ);

Missouri – *Reynolds v. Diamond Foods & Poultry, Inc.*, 79 S.W.3d 907 (Mo. 2002, no writ);

Nevada – *Edwards v. Direct Access, L.L.C.*, 124 P.3d 1158 (Nev. 2005, no writ);

Pennsylvania – *Aronson v. Fax.com, Inc.*, 51 Pa. D. & C.4th 421 (Pa. Ct. Com. Pl. 2001, no writ);

Fourth Circuit Court of Appeals – *Int'l Science & Tech. Inst., Inc. v. Inacom Commc'ns, Inc.*, 106 F.3d 1146 (4th Cir. 1997, no writ);

Opt-in (1 state court):

Texas – *Chair King, Inc. v. GTE Mobilnet of Houston, Inc.*, 49 Tex. Sup. Ct. J. 336, 2006 Tex. LEXIS 97 (Tex. Feb. 3, 2006).

Because of this split of authority among several state and federal courts on the interpretation of this federal statute, this Court should grant certiorari. *See* SUP. CT. R. 10(b); *St. Martin*, 451 U.S. at 780 n.10.

B. A conflict exists between the highest court of a state and a federal court of appeals on a question of federal law.

This Court has also previously granted certiorari in cases involving a conflict between the highest court of a state and a federal court of appeals in the interpretation of a federal law. *See* SUP. CT. R. 10(c); *Martinez v. Court of Appeal of California*, 528 U.S. 152, 155 (2000) (granting certiorari because question raised was one "on which both state and federal courts have expressed conflicting views"). In this case, such a conflict exists because the Fourth Circuit has rejected the opt-in interpretation chosen by the Texas Supreme Court:

> The clause . . . 'if, otherwise permitted by the laws or rules of court of a State' does not condition the substantive right to be free from unsolicited faxes on State approval. . . . Rather, the clause recognizes that states may refuse to exercise the jurisdiction authorized by the statute. Thus, a state could decide to prevent its courts from hearing private actions to enforce the TCPA's substantive rights.

See Int'l Science, 106 F.3d at 1156. Thus, this Court should grant certiorari to resolve this conflict between state and federal courts over the TCPA. *See* SUP. CT. R. 10(b); *Martinez*, 528 U.S. at 155.

II. The Texas Supreme Court's opinion is a violation of the Supremacy Clause of the United States Constitution.

This Court may exercise its jurisdiction to consider a case in which a state court has decided a substantial and unsettled federal question arising under the Constitution. *See Pennsylvania Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 362 (1998). Such is the case here.

A. States are required to enforce federal law under the Supremacy Clause.

The decision below is contrary to the Supremacy Clause requirement that states must entertain federal claims. State courts of general jurisdiction are inherently empowered and required to enforce federal law. *Tafflin*, 493 U.S. at 460-61; *Testa v. Katt*, 330 U.S. 386, 389-90 (1947). State courts with proper jurisdiction may refuse to hear federal claims only in two circumstances: (1) where Congress explicitly provides exclusive jurisdiction to federal courts over claims arising under federal law, *Tafflin*, 493 U.S. at 460-61 (citing *Houston v. Moore*, 5 Wheat. 1, 25-26, 5 L.Ed. 19 (1820)); *Printz v. United States*, 521 U.S. 898, 906 n.1 (1997), or (2) the claim is prevented by a state's neutral rule of judicial administration. *Douglas v. New York, New Haven & Hartford R.R. Co.*, 279 U.S. 377, 387-89 (1929) (state statute permitting discretionary dismissal of federal claim where neither party was resident of forum state was proper); *see also Herb v. Pitcairn*, 324 U.S. 117 (1945). Neither exception is present here.

Furthermore, under the Supremacy Clause, a state cannot refuse to hear a claim arising under federal law unless that

law exceeds its just and constitutional authority. *Printz*, 521 U.S. at 911-12 (citing The Federalist No. 27, at 177 (A. Hamilton)). This Court has consistently held that if Congress intends to permit state action – such as a state's refusal to hear federal claims – that would be unconstitutional absent congressional consent, it must make its intent "unmistakably clear." *See, e.g. S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 91-92 (1984); *see also Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 466 (1989) ("[W]e are loath to conclude that Congress intended to press ahead into dangerous constitutional thickets in the absence of firm evidence that it courted those perils."). The TCPA evinces no such clear intent, nor is it certain that congressional consent to a state's refusal to entertain federal claims is a sufficient cure to the constitutional problem.

B. There is no "unmistakably clear" language in the statute showing that Congress intended to allow states to refuse TCPA claims.

In the case of the TCPA, it is not unmistakably clear that Congress' language "if otherwise permitted by the laws or rules of court of a State" was intended to give states the choice not to enforce federal law. Consequently, a state's action in refusing enforcement of the TCPA is unconstitutional. *Schulman v. Chase Manhattan Bank*, 710 N.Y.S.2d 368 (N.Y. App. Div. 2000) (citing *Mondou v. New York, New Haven, & New Hartford R.R. Co.*, 23 U.S. 1, 57 (1912)). The Texas Supreme Court's decision is therefore contrary to the Supremacy Clause because it makes the TCPA unenforceable and does away with the presumption that federal law is enforceable in state court. *Tafflin*, 493 U.S. at 460-61. Thus, this Court should exercise its jurisdiction and grant the petition. *See* 28 U.S.C. § 1257(a).

Congress gave state courts exclusive jurisdiction over private TCPA claims, which strengthens the presumption that state courts have jurisdiction to enforce this federal law. *Fed. Energy Regulatory Comm'n v. Miss.*, 456 U.S. 742, 760-761 (1982) (noting that sovereignty principles set forth in *Testa* were controlling in analyzing federal statutes requiring state regulatory agencies to consider specific federal proposals regarding the nation's energy resources). Obviously, if there is no federal question jurisdiction and no state is obliged to hear such claims, the only way TCPA claims could be heard would be as claims asserting federal diversity jurisdiction. Surely Congress did not intend to create such a perverse and byzantine enforcement scheme in which only plaintiffs suing diverse defendants would be able to maintain a claim.

C. The decision below renders the TCPA's regulatory floor meaningless.

Finally, section 227(e) of the TCPA provides that states may impose more restrictive requirements than those contained in the TCPA. 47 U.S.C. § 227(e). This provision implies that less restrictive state requirements are preempted by the TCPA. *Id.* If the TCPA were inactive until states passed redundant "enabling" legislation, as the court below held, then the TCPA would not preempt the least restrictive of all requirements – that is, no restriction at all – rendering § 227(e) meaningless. *Id.* Thus, the conclusion below violates established rules of statutory construction. *See Erienet, Inc. v. Velocity Net, Inc.*, 156 F.3d 513, 516 (3rd Cir. 1998).

III. This case involves a right asserted under a federal statute.

Congress has given this Court the power to review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . . where any . . . right . . . is specially set up or claimed under the Constitution or the treaties or statutes of . . . the United States." 28 U.S.C. § 1257(a). This case involves Chair King's asserted rights under the TCPA, a federal statute, and the highest court of Texas has passed judgment on the statute. Thus, this Court may properly exercise its jurisdiction over that judgment. *See Howell v. Mississippi*, 543 U.S. 440, 443 (2005).

The decision below assumes that Congress thought states would not want to permit TCPA actions (even though junk faxes were considered a "national plague") and that Congress drafted the statute so that states would be required to take the redundant step of enacting specific laws or rules of court to "enable" the TCPA. (App. at 25a). This interpretation is contrary to the statute's intended and most important purpose – to swiftly wipe out unsolicited automated facsimile and telephone telemarketing. *Chair King*, 135 S.W.3d at 377-78. There is no sound reason for concluding that Congress would pass legislation intending it to be unenforceable and ineffective. One would at least expect the TCPA's legislative history to express such an unusual intention. It does not. *Id.* at 378-79. Instead, the legislative history shows that Congress intended the bill to immediately create a private right of action so that citizens and businesses in Texas and in other states could stop unsolicited telemarketing and avoid being forced to pay for a portion of the advertisement. *Id.* at 380-81. The decision below defeats that intent.

IV. The decision below creates uncertainty about the scope of application of 28 U.S.C. § 1658 to causes of action arising under federal law.

The Texas Court of Appeals held that 28 U.S.C. § 1658, the general federal statute of limitations, does not apply to the TCPA, even though the TCPA is a federal law, was enacted after § 1658, and has no limitations period. *Chair King*, 135 S.W.3d at 393. The Texas Supreme Court granted review of whether § 1658 applies to the TCPA, but ultimately declined to decide the issue because it held that Texas was required to opt-in to the TCPA (but had not) when the violations against Chair King occurred. *Chair King*, 2006 Tex. LEXIS 97, at *33.

A. Congress enacted 28 U.S.C. § 1658 because the practice of borrowing limitations periods from state law for federal actions became unworkable.

The TCPA, like many other federal statutes, contains no statute of limitations. *See* 47 U.S.C. § 227 *et seq.* This Court has noted that Congress oftentimes fails to provide a statute of limitations in federal legislation. *See Board of Regents v. Tomanio*, 446 U.S. 478, 483 (1980); *see also Jones v. R.R. Donnelly & Sons Co.*, 541 U.S. 369, 371 (2004). Left without guidance as to the appropriate limitations period for these federal actions (a decision historically made by the legislature), federal and state courts traditionally "borrowed" a limitations period from the most analogous state law claim. *Id.* at 377-78.

Over time, federal courts found this practice to be burdensome and impractical because it created difficulty determining which forum state's limitations period was most

appropriate for the federal claim, forced courts to address continuous conflict of law issues, resulted in inconsistent expectancies for limitations in federal actions, and created confusing and complicated commencement and tolling issues. *Id.* at 378-79.[5] As a result, courts and commentators called upon Congress to enact a single limitations period for all federal causes of action. *Id.*; H.R. REP. NO. 101-734, at 24 (1990).

Congress responded by enacting 28 U.S.C. § 1658 to provide a residual statute of limitations for all federal actions enacted after December 1, 1990, that have no limitations period:

> Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues.

28 U.S.C. § 1658; *see Jones*, 541 U.S. at 379-80. The House Report on the bill states that "with respect to many statutes that have no explicit limitations provision, the applicable limitations period found by courts varies dramatically from state to state" and that § 1658 "addresses this problem by creating a four-year fall-back statute of limitations, applicable to legislation enacted after [1990], which creates a cause of action but is silent as to the applicable limitations period." *See* H.R. REP. NO. 101-734, at 24 (1990). The Senate reached the same conclusions as the House. *See* 136 CONG. REC. S17,570 (daily ed. Oct. 27, 1990).

5. The Seventh Circuit described this method as "at best uncertain and at worst arbitrary." *See McCartney C. v. Herrin Cmty. Unit Sch. Dist., No. 4*, 21 F.3d 173, 174 (7th Cir. 1994).

B. The decision below is inconsistent with this Court's holding in *Jones*.

In *Jones*, this Court held that § 1658 applied to a petitioner's hostile work environment, wrongful termination, and failure-to-transfer claims, because they were made possible by the 1991 amendments to § 1981. 541 U.S. at 382. As in *Jones*, on its face the TCPA meets all of § 1658's elements – it is federal legislation enacted after December 1, 1990; it creates a cause of action under federal law; and it has no limitations period. 47 U.S.C. § 227; *see Harris v. Allstate Ins. Co.*, 300 F.3d 1183, 1189 (3d Cir. 2002) ("Judicial inquiry into the applicability of [§ 1658] begins and ends with what [§ 1658] does say and with what [§ 1658] does not.") (citing *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992)).

Even so, the Texas intermediate court of appeals held that § 1658's "[e]xcept as otherwise provided by law" language exempts the TCPA from the uniform four-year period. *Chair King*, 135 S.W.3d at 390-91. In its opinion, the court of appeals says "Congress could have enacted a TCPA private damage claim with a four-year federal limitations period." *Chair King*, 135 S.W.3d at 391. Congress did exactly that by enacting the TCPA without altering the general four-year limitations period of § 1658. *See Cannon v. Univ. of Chicago*, 441 U.S. 677, 696-98 (1979); *see also Argonaut Ins. Co. v. Baker*, 87 S.W.3d 526, 531 (Tex. 2002) (noting that a statute is presumed to have been enacted by the legislature with complete knowledge of the existing law and with reference to it). Congress created § 1658 so that neither it nor the courts would have to revisit limitations every time a new federal cause of action was created. *See Jones*, 541 U.S. at 378-79. Not applying § 1658 to TCPA

actions conflicts with this Court's broad reading of § 1658 in *Jones*. *See id.*; *see also* SUP. CT. R. 10(c). Accordingly, this Court should grant certiorari. *See Limbach v. Hooven & Allison Co.*, 466 U.S. 353, 362 (1984); *Hudson v. Louisiana*, 450 U.S. 40, 42 (1981).

C. The decision below revives the practice of borrowing state law limitations for federal actions in federal court.

Congress did not remove diversity jurisdiction from federal courts when it passed the TCPA; it removed only federal question jurisdiction. *See* 28 U.S.C. § 1332; *Gottlieb v. Carnival Corp.*, 436 F.3d 335, 339 (2d Cir. 2006); *Accounting Outsourcing, L.L.C.*, 329 F. Supp. 2d at 818 (holding plaintiffs could maintain class action TCPA claims under diversity jurisdiction assuming class action test satisfied).[6] Thus, although private TCPA claims cannot be maintained in federal court under *federal question jurisdiction*, such claims can be filed or removed to federal court under *diversity jurisdiction*. *Id.* In a diversity case, the federal court would apply the limitations period from the same source as the substantive law – here federal law. *See Chair King*, 135 S.W.3d at 390 (citing *Guaranty Trust Co. v. York*, 326 U.S. 99, 108-11 (1945)). This would require

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6. *See also Kinder v. Citibank*, No: 99-CV-2500 W (JAH), 2000 U.S. Dist. LEXIS 13853, *5-8 (S.D. Cal. Sept. 14, 2000) (holding diversity of citizenship is independent basis for federal jurisdiction and nothing in TCPA precludes federal courts from hearing private TCPA claims where this independent basis for federal jurisdiction exists); *Kopff v. World Research Group, LLC*, 298 F. Supp. 2d 50, 55-56 (D.D.C. 2003) (same); *Gold Seal Termite & Pest Control Co. v. DirecTV, Inc.*, No. 1:03-cv-00367-LJM-WTL, 2003 U.S. Dist. LEXIS 11205, *16 (S.D. Ind. June 10, 2003).

the application of § 1658 to the federal action. *Chair King*, 135 S.W.3d at 390. The same is true for any other federal action removed to federal court where concurrent jurisdiction applied. *See Mulhern v. MacLeod*, 808 N.E.2d 778 (Mass. 2004).

However, the court of appeals' holding means that in TCPA diversity actions, state law will supply different limitations periods for federal actions in federal courts, bringing us back full circle to the problem Congress sought to eliminate by passing a universal limitations period for actions that it created after 1990. *See Jones*, 541 U.S. at 378-79. Some states would apply a two-year rule, others four or five. This "limitations hodge-podge" is not what Congress intended. *See id.*

Moreover, because the FCC and State Attorneys General can file TCPA claims in federal court, § 1658 will likely apply to these actions. 47 U.S.C. § 227(c)(5), § 227(f). Under the appellate court's decision, though, the private claims will be subject to state law tort limitations. *Chair King*, 135 S.W.3d at 391. There is no reason for this internal inconsistency, with one limitations period for governmental claims and another for private causes of action. They are all federal claims and should all have the same limitations period – the one set up by § 1658. *See* 47 U.S.C. § 227(b)(3), (c)(5), (f).

Finally, the resort to a shorter limitations period – here, two years – is flatly inconsistent with the TCPA's provision expressly preempting less restrictive state provisions. A shorter period for bringing claims is more restrictive on the claimants and therefore less restrictive on alleged violators of the statute.

D. The decision below means that at least four states have inconsistently applied 28 U.S.C. § 1658 to the TCPA.

The decision below creates a split on the issue of whether 28 U.S.C. § 1658 applies to the TCPA. *Compare Chair King*, 135 S.W.3d at 391 (holding that 28 U.S.C. § 1658 does not apply to the TCPA) and *David L. Smith & Assoc., L.L.P. v. Advanced Placement Team*, 169 S.W.3d 816, 822 (Tex. App. – Dallas 2005, pet. denied) (same) *with Zelma v. Konikow*, 879 A.2d 1185, 1190 (N.J. Super. Ct. App. Div. 2005) (holding that 28 U.S.C. § 1658 applies to the TCPA) *and Edwards v. Emperor's Garden Rest.*, 130 P.3d 1280 (Nev. 2006) (same).

CONCLUSION

The Texas Supreme Court's decision completes a three-way split among the highest courts of several states in the interpretation of the phrase "if otherwise permitted by the laws or rules of court of a State" in the TCPA. Thus, this issue has percolated up through the state and federal courts and is now ripe for review. Likewise, the decision of the intermediate Texas Court of Appeals regarding limitations means that at least four states have now split over what law – federal or state – should be the source of the limitations period for claims brought under the TCPA. This case brings these issues squarely before this Court, and warrants an exercise of this Court's jurisdiction to review and resolve these conflicts.

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE SUPREME COURT OF TEXAS ARUGUED APRIL 14, 2005 OPINION DELIVERED FEBRUARY 3, 2006

SUPREME COURT OF TEXAS

NO. 04-0570

April 14, 2005, Argued
February 3, 2006, Opinion Delivered

THE CHAIR KING, INC., CHAIR KING, S.A., INC., JEROME KOSOY, M.D., M.E. FORD AND ASSOCIATES, BEAUTIQUE, INC., DISCOVERY SERVICES OF TEXAS, INC., VANTAGE SHOE WAREHOUSE, INC., COUNSELOR SYSTEMS, INC., POPE AND BOOTH, P.C., JEFFREY K. MUSKER, D.C., AND POPE ESCROW COMPANY,

PETITIONERS,

v.

GTE MOBILNET OF HOUSTON, INC., AND CHICK-FIL-A, INC.,

RESPONDENTS.

NOTICE: PUBLICATION STATUS PENDING. CONSULT STATE RULES REGARDING PRECEDENTIAL VALUE.

PRIOR HISTORY: ON PETITION FOR REVIEW FROM THE COURT OF APPEALS FOR THE FOURTEENTH DISTRICT OF TEXAS. *Chair King Inc. v. GTE Mobilnet of*

Appendix A

Houston, Inc., 135 S. W.3d 365, 2004 Tex. App. LEXIS 4152 (Tex. App. Houston 14th Dist, 2004)

JUDGES: JUSTICE O'NEILL delivered the opinion of the Court. JUSTICE WAINWRIGHT did not participate in the decision.

OPINION BY: Harriet O'Neill

OPINION

JUSTICE O'NEILL delivered the opinion of the Court.

JUSTICE WAINWRIGHT did not participate in the decision.

The suit underlying this appeal complains of unsolicited faxes sent in violation of the federal Telephone Consumer Protection Act, 47 U.S.C. § 227 ("TCPA"), which grants those who receive illegal faxes a private cause of action in state court "if otherwise permitted by the laws or rules of court of a State." 47 U.S.C. § 2271(b)(3). Texas did not expressly permit a private right of action for unsolicited faxes until September 1, 1999, when the Legislature amended the Business and Commerce Code to allow parties to bring suit in state court for TCPA violations. Act of May 26, 1999, 76th Leg., R.S., ch. 635, § 1, 1999 Tex. Gen. Laws 3203 (current version at TEX BUS. & COM CODE § 35.47(f)). We must decide whether the faxes at issue in this case, which were sent before September 1, 1999, are actionable in Texas state courts under the TCPA. We conclude that they are not, and reverse and render judgment against the recipients.

Appendix A

I. Background

Beginning in 1992, The Chair King, Inc., and others[1] (collectively "plaintiffs" or "recipients") complain that they began to receive illegal faxes from various companies advertising their products. They originally filed suit in federal court, but the court dismissed the case for lack of subject-matter jurisdiction.[2] *Chair King, Inc. v. Houston Cellular Corp.*, 131 F.3d 507, 509 (5th Cir. 1997). The plaintiffs then filed this suit in state court against a number of defendants[3]

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1. Chair King, S.A., Inc., Jerome Kosoy, M.D., M.E. Ford and Associates, Beautique, Inc., Discovery Services of Texas, Inc., Vantage Shoe Warehouse, Inc., Counselor Systems, Inc., Pope 2006 and Booth, P.C., Jeffrey K. Musker, D.C., and Pope Escrow Company.

2. Like nearly all federal courts that have considered the jurisdictional issue, the Fifth Circuit determined that state court jurisdiction over private TCPA actions is exclusive of, not concurrent with, federal court jurisdiction. *Chair King v. Houston Cellular Corp.*, 131 F.3d at 513; *see Murphey v. Lanier*, 204 F.3d 911, 913-15 (9th Cir. 2000); *Int'l Sci. & Tech. Inst., Inc. v. Inacom Commc'ns, Inc.*, 106 F.3d 1146, 1152 (4th Cir. 1997); *ErieNet, Inc. v. Velocity Net, Inc.*, 156 F.3d 513, 520 (3d Cir. 1998); *Foxhall Realty Law Offices, Inc. v. Telecomms. Premium Serv's., Ltd.*, 156 F.3d 432, 438 (2d Cir. 1998); *Nicholson v. Hooters of Augusta, Inc.*, 136 F.3d 1287, 1289 (11th Cir. 1998), *modified by* 140 F.3d 898 (11th Cir. 1998); *contra Kenro, Inc. v. Fax Daily, Inc.*, 904 F. Supp. 912, 915 (S.D. Ind. 1995), *Kenro, Inc. v. Fax Daily, Inc.*, 962 F. Supp. 1162, 1164 (S.D. Ind. 1997). The parties do not dispute that determination, and we will presume it here.

3. Chevrolet Country, Inc., Watson Investment Group, Inc., Amaturo Group, Ltd., Budget Rent-a-Car Systems, Inc., and Hillcroft Enterprises, Inc. GTE Mobilnet and Chick-Fil-A, among dozens of (Cont'd)

alleging a private damage claim under the TCPA, negligence, negligence per se, invasion of privacy, trespass to chattels, gross negligence, and conspiracy among the senders. The trial court granted the defendants' joint and individual summary-judgment motions and denied the plaintiffs' motion for partial summary judgment. The plaintiffs settled with various defendants during the course of the proceedings, leaving only GTE Mobilnet of Houston, Inc. ("GTE Mobilnet") and Chick-Fil-A, Inc. ("Chick-Fil-A") as defendants before the court of appeals.

The court of appeals affirmed the trial court's judgment in part, and reversed and remanded in part. 135 S.W.3d 365. Specifically, the court affirmed the trial court's summary judgment on all of the common-law claims, on all claims against Chick-Fil-A after applying Texas' two-year statute of limitations, and on certain plaintiffs' TCPA claims against GTE Mobilnet that the court considered barred by limitations. *Id.* at 396-97. The court reversed the trial court's judgment as to the remaining plaintiffs' TCPA claims against GTE Mobilnet,[4] which were remanded for further proceedings. *Id.*

Both sides petitioned this Court for review, the plaintiffs challenging the court of appeals' determination of the limitations issue and the defendants contending, *inter alia*,

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(Cont'd)

others, were subsequently added as defendants in the plaintiffs' first amended original petition.

4. The remaining claims are those of Jerome Kosoy, M.D., Beautique, Inc., Discovery Services of Texas, Inc., and Jeffrey K. Musker, D.C.

that there was no TCPA private right of action cognizable in Texas courts until the Legislature enacted enabling legislation in 1999. Alternatively, defendants claim they cannot be liable for faxes transmitted by independent advertising companies acting at the behest of independent retailers. We granted the parties' petitions for review to consider the TCPA's application and related issues.

II. The Telephone Consumer Protection Act

A. History

Congress enacted the Telephone Consumer Protection Act in 1991 by amending the Communications Act of 1934. Pub. L. No. 102-243, 105 Stat. 2394, (codified as amended at 47 U.S.C. § 227). The TCPA's purposes were to "protect the privacy interests of residential telephone subscribers by placing restrictions on unsolicited, automated telephone calls . . . and to facilitate interstate commerce by restricting certain uses of facsimile (fax) machines and automatic dialers." S. REP. NO. 102-178, at 1 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968, 1968. The legislation was intended to address a growing number of consumer complaints related to the use of automated telephone equipment to make unsolicited telephone calls and faxes. That growth was spurred by a dramatic decrease in the cost of long-distance service, which in turn reduced the expenses associated with telemarketing. *Id.* at 2, *reprinted in* 1991 U.S.C.C.A.N. 1968, 1969-70.

Before the TCPA's enactment, many states had promulgated regulations aimed at limiting unsolicited

intrastate telemarketing, but constitutional constraints prevented them from reaching interstate communications. *Id.* at 3, *reprinted in* 1991 U.S.C.C.A.N. 1968, 1970 (noting "States do not have jurisdiction over interstate calls. Many States have expressed a desire for Federal legislation to regulate interstate telemarketing calls to supplement their restrictions on intrastate calls."). By the time the TCPA became law, over forty states had legislatively limited the use of automatic-dialer recorded-message players or otherwise restricted telemarketing.[5] *Id., reprinted in* 1991 U.S.C.C.A.N. 1968, 1970. But given that state regulation reached only intrastate communications, consumer complaints to the Federal Communications Commission (FCC) soared. *Id., reprinted in* 1991 U.S.C.C.A.N. 1968, 1970. The TCPA quickly followed.

B. Statutory Framework

The TCPA presents what has been described as "an unusual constellation of statutory features." *Chair King*, 131 F.3d at 512. On one hand, the Act creates a federal private right of action, but on the other it confers exclusive jurisdiction on state courts to entertain it. *Id.* The TCPA does contain an exclusive federal enforcement component, authorizing state attorneys general to bring civil actions in federal court on behalf of their state's residents to obtain injunctive relief against unauthorized telephone calls and

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5. Texas did not recognize a private cause of action for unsolicited faxes, but had enacted a criminal statute making it a Class C misdemeanor to advertise by such means. *See* Act of May 23, 1989, 71st Leg., R.S., ch. 783, § 1, 1989 Tex. Gen. Laws 3469, 3469 (current version at TEX BUS. & COM. CODE § 35.47(e)).

facsimiles and to recover monetary damages. 47 U.S.C. § 227 (f)(1)-(2). For such actions the TCPA authorizes the FCC to intervene as of right, to be heard in all such matters, and to file petitions for appeal. 47 U.S.C. § 227(3). But for purposes of private enforcement and redress, state-court jurisdiction is exclusive.

Under the TCPA, it is illegal to "use any telephone facsimile machine, computer or other device to send an unsolicited advertisement to a telephone facsimile machine." 47 U.S.C. § 227(b)(1),(c). Section 227(b)(3) creates a private right of action for recipients of unsolicited faxes to obtain monetary and injunctive relief, as follows:

> **Private Right of Action**. A person or entity may, *if otherwise permitted by the laws or rules of court of a State*, bring in an appropriate court of that State –
>
> > (A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,
> >
> > (B) an action to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater, or
> >
> > (C) both such actions.

Id. § 227(b)(3) (emphasis added). It is the import of the statutory proviso—"if otherwise permitted by the laws or rules of court of a State"—that the parties dispute and that courts have struggled to interpret.

The defendants claim the right of action that the TCPA affords is not self-implementing; that is, the private cause of action the Act creates is not immediately enforceable in Texas courts without state enabling legislation. For the plaintiffs to bring such a claim, defendants contend, Texas laws or rules of court must "otherwise permit" it, and Texas did not until September 1, 1999, when the Legislature amended the Texas Business and Commerce Code to permit private TCPA claims.[6] Act of May 26, 1999, 76th Leg., R.S., ch. 635, § 1, 1999 Tex. Gen. Laws 3203, 3203 (codified as amended at TEX. BUS. & COM. CODE § 35.47(f)). Defendants' argument mirrors what has sometimes been referred to as the "opt-in" approach to the TCPA, in effect requiring some type of affirmative state buy-in before the federally-created private right of action is cognizable in state court.

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6. Section 35.47(f) states in pertinent part:

> A person who receives a communication that violates 47 U.S.C. Section 227, a regulation adopted under that provision, or this section may bring an action against the person who originates the communication in a court of this state for an injunction, damages in the amount provided by this subsection, or both.

TEX BUS. & COM CODE 35.47(f).

The plaintiffs take a contrary view. Because the TCPA is federal law, they claim, state courts of general jurisdiction are inherently empowered, and indeed required, to enforce it. *See Tafflin v. Levitt*, 493 US. 455, 459-61, 110 S.Ct. 792, 107 L.Ed 2d 887 (1990). According to plaintiffs, the TCPA created an immediately actionable private right of action in state court and there was no need for state enabling legislation. To support their position, plaintiffs posit two interpretations of the TCPA commonly known as "acknowledgment" and "opt-out."

For reasons that we will explain, we believe the TCPA's plain language, purpose, and historical context favor the "opt-in" interpretation. We begin by examining all three interpretive approaches and the reasoning behind them.

C. Interpreting the Statutory Proviso

1. The "Acknowledgment" Approach

The "acknowledgment" position that some courts have adopted interprets the *Supremacy Clause of the United States Constitution* to require states to provide a forum for private TCPA damage claims with no ability to decline. *See R.A. Ponte Architects, Ltd v. Investors' Alert, Inc.*, 382 Md. 689, 857 A.2d 1 (Md. 2004); *Consutner Crusade, Inc. v. Affordable Health Care Solutions, Inc.*, 121 P.3d 350, 2005 Colo. App. LEXIS 1354 (Colo. Ct. App. Aug. 25, 2005); U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States. . .shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby. . . ."). The focal point of the "acknowledgment" approach is the general rule that a state may not decline to enforce a federal cause of action:

Appendix A

> The Constitution and laws passed pursuant to it are as much laws in the State as laws passed by the state legislature. The *Supremacy Clause* makes those laws "the supreme Law of the Land," and charges state courts with a coordinate responsibility to enforce that law according to their regular modes of procedure.

Howlett v. Rose, 496 U.S. 356, 367, 110 S. Ct. 2430, 110 L. Ed 2d 332 (1990). According to this view, no state enabling legislation is necessary for parties to assert private TCPA causes of action, and states may not decline to entertain them. The presumption of state-court jurisdiction over federal causes of action can be rebutted only "by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests," *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478, 101 S. Ct. 2870, 69 L. Ed 2d 784 (1981), and courts espousing the acknowledgment view have found nothing in the TCPA's language or legislative history to rebut the presumption. *See, e.g., Consumer Crusade*, 121 P.3d 350, 2005 Colo. App. LEXIS 1354, at *9.

It is, of course, generally true that states may not decline to recognize or enforce federal law. *Howlett*, 496 US. at 371. But the federal law that states are required to enforce must be applied according to its terms. Had the TCPA simply provided that "[a] person or entity may . . . bring . . . an action based on a [TCPA] violation," the states' constitutional obligation under the *Supremacy Clause* to entertain such claims would be irrefutable. But Congress chose to qualify the private TCPA right of action it created by including the proviso "if otherwise permitted by the laws or rules of court

of a State." 47 U.S.C. § 227(b)(3). Failure to give effect to the statutory proviso would itself run the risk of violating the *Supremacy Clause* by refusing to apply the federal right as written.

Under the "acknowledgment" interpretation, the TCPA's "if otherwise permitted" language merely acknowledges states' rights to structure their court systems and apply neutral state-court procedures to federal causes of action. *See, e.g., Consumer Crusade*, 121 P.3d 350, 2005 Colo. App. LEXIS 1354, at *10 (stating "no state can refuse to entertain a private TCPA action, but a state is not compelled to adopt special procedural rules for such actions"). Courts adopting this interpretation have relied heavily on a speech by the TCPA's author, Senator Ernest Hollings of South Carolina, when he introduced the substitute bill containing the private right of action eventually codified at 47 U.S.C. § 227(b)(3):

> The substitute bill contains a private right-of-action provision that will make it easier for consumers to recover damages from receiving these computerized calls. The provision would allow consumers to bring an action in State court against any entity that violates the bill. The bill does not, because of constitutional constraints, dictate to the States which court in each State shall be the proper venue for such an action, as this is a matter for State legislators to determine. Nevertheless, it is my hope that States will make it as easy as possible for consumers to bring such actions, preferably in small claims court. The consumer outrage at receiving these calls is clear.

> Unless Congress makes it easier for consumers to obtain damages from those who violate this bill, these abuses will undoubtedly continue.
>
> Small claims court or a similar court would allow the consumer to appear before the court without an attorney. The amount of damages in this legislation is set to be fair to both the consumer and the telemarketer. However, it would defeat the purposes of the bill if the attorneys' costs to consumers of bringing an action were greater than the potential damages. I thus expect that the States will act reasonably in permitting their citizens to go to court to enforce this bill.

137 CONG. REC. 30821-22 (1991) (statement of Sen. Hollings). Senator Hollings's speech on the day the substitute bill was introduced is the only available legislative history concerning the private-right-of-action provision.

We do not find the argument that Senator Hollings's speech compels an "acknowledgment" interpretation persuasive. While the statement may have accurately reflected Senator Hollings's understanding of the private right of action, there can be no certainty that it reflected the view of the entire Congress. *See Gen. Chem. Corp. v. De La Lastra*, 852 S. W.2d 916, 923, 36 Tex. Sup. Ct. J. 574 (Tex. 1993) ("The intent of an individual legislator, even a statute's principal author, is not legislative history controlling the construction to be given a statute."). And even if we were to presume that Senator Hollings's speech accurately captured congressional intent, it can just as fairly be read to support

an "opt-in" approach. By stating his expectation that "the States will act reasonably in permitting their citizens to go to court to enforce this bill," Senator Hollings implies that states must act in an affirmative manner before the TCPA private damage claim is cognizable in state court. In sum, we believe that Senator Hollings's remarks are of limited interpretive value.

The "acknowledgment" approach to interpreting the TCPA's "if otherwise permitted" proviso presents a number of problems. For one, it renders certain language in the TCPA "doubly redundant." *Chair King*, 135 S. W.3d at 381. State district courts of general jurisdiction are presumed to have adjudicative power over federal statutory private damage claims unless Congress specifically decides otherwise, so there would be no reason for Congress to import that general principle into the statutory proviso when it does not do so in other federal statutes. *See id.* Nevertheless, Congress did choose to acknowledge this general principle elsewhere in the TCPA by stating that suit may be brought "in an appropriate court of that State." 47 U.S.C. § 227(b)(3). Interpreting the "if otherwise permitted" provision to have the same meaning "would be redundant and risk rendering the words meaningless." *Chair King*, 135 S. W.3d at 382.

The strongest argument supporting the "acknowledgment" approach emphasizes the statutory proviso's reference to court rules: "if otherwise permitted by the laws *or rules of court* of a State. . . ." 47 U.S.C. § 227(b)(3) (emphasis added). "Rules of court" generally refer to the procedures courts implement to conduct official business. See, e.g., BLACK'S LAW DICTIONARY 369 (7th

ed. 1999) (defining "court rules" as "regulations having the force of law governing practice and procedure in the various courts"). Plaintiffs assert that by referencing "rules of court," which generally do not confer subject-matter jurisdiction over causes of action, Congress chose to acknowledge states' rights to independently administer their own courts and, by negative implication, signaled no intent to require affirmative legislative action at the state level before a party could exercise the private right of action. Any other interpretation, plaintiffs claim, would render the "rules of court" language mere surplusage. *See Spradlin v. Jim Walter Homes, Inc.*, 34 S.W.3d 578, 580, 44 Tex. Sup. Ct. J. 158 (Tex. 2000). However, applying an "acknowledgment" interpretation to the statutory proviso is no less problematic. As we have said, the same rule against surplusage is equally applicable to the "acknowledgment" interpretation. *See Chair King*, 135 S. W.3d at 381 (stating "it would be redundant and risk rendering the words meaningless to interpret the 'if otherwise permitted' clause to have the same meaning [as the clause allowing suit 'in an appropriate court of that State']"). Moreover, if the statutory reference to "rules of court" was intended to imply no state option over allowing the federally created claim, the "if otherwise permitted *by the laws . . . of a State*" language would be rendered surplusage. 47 U.S.C. § 227(b)(3,) (emphasis added); *see Spradlin*, 34 5. W.3d at 580.

In sum, we see no clear indication in either the statutory language or the legislative history that would indicate Congress intended to unconditionally mandate a private TCPA damage claim in state court that the states could not choose to decline. Like the court of appeals, we reject the

"acknowledgment" interpretation of the TCPA that some courts have followed.

Having determined that the statutory proviso was intended to give the TCPA some conditional effect, we must decide whether Congress intended for the Act to apply unless a state opted out, or only if a state opted in.

2. The "Opt-out" Approach

The "opt-out" interpretation reads the TCPA to immediately authorize private rights of action in state court without the necessity of affirmative state action, but allows states to legislatively decline to entertain them. To date, this appears to be the majority view of the relatively few courts that have had occasion to decide the issue. *See Mulhern v. MacLeod*, 441 Mass. 754, 808 N.E.2d 778 (Mass. 2004); *Lary v. Flasch Bus. Consulting*, 878 So. 2d 1158 (Ala. Civ. App. 2003,); *Condon v. Office Depot, Inc.*, 855 So. 2d 644 (Fla. Dist. Ct. App. 2003); *Kaufman v. ACS Sys., Inc.*, 110 Cal. App. 4th 886, 2 Cal. Rptr. 3d 296 (Cal Ct. App. 2003); *Reynolds v. Diamond Foods & Poultry Inc.*, 79 S.W.3d 907 (Mo. 2002); *Zelma v. Market U.S.A.*, 343 N.J. Super. 356, 778 A.2d 591 (N.J. Super. Ct. App. Div. 2001); *Aronson v. Fax.com Inc.*, 51 Pa. D. & C.4th 421 (Ct. Com. Pl. 2001); *Hooters of Augusta, Inc. v. Nicholson*, 245 Ga. App. 363, 537 S.E.2d 468 (Ga. Ct. App. 2000); *Schulman v. Chase Manhattan Bank*, 268 A.D.2d 174, 710. N.Y.S.2d 368 (N.Y App. Div. 2000). Of the courts that follow the "opt-out" position, none has yet determined that a state has actually opted out of providing a forum for private TCPA claims.

Until this case, only one court of appeals in Texas has had occasion to interpret section 227(b)(3)'s "if otherwise permitted" proviso,[7] and it determined that the statute's plain language compelled an "opt-in" interpretation; that is, a state must affirmatively act before the federally-created claim is cognizable in its courts. *Autoflex Leasing, Inc. v. Mfrs. Auto Leasing*, 16 S.W.3d 815, 817 (Tex. App.—Fort Worth 2000, *pet. denied*). The court held that the "plain and ordinary" meaning of the statutory proviso indicates "Congress intended the states to pass legislation or promulgate court rules consenting to state court actions based on the TCPA, before such suits under the TCPA may be brought in state courts." *Id.* Because Texas did not authorize a private right of action in state court under the TCPA until September 1, 1999, and the faxes at issue in *Autoflex* were sent before the state legislation became effective, the court affirmed the trial court's judgment dismissing the plaintiff's claim. *Id.* at 817-18.

In this case, the court of appeals rejected the *Autoflex* interpretation in favor of the "opt-out" approach for several reasons, some of which have similarly led other courts along the same path. *Chair King*, 135 S.W.3d at 379. Those reasons,

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7. A recent decision from the Court of Appeals for the Fifth Court of Appeals District reviewed the TCPA's "if otherwise permitted" proviso, but only in the context of determining the applicable limitations period. *See Smith & Assocs., LLP v. Advanced Placement Team, Inc.*, 169 S.W.3d 816 (Tex. App—Dallas 2005, pet. filed,) (dismissing the plaintiff's TCPA claims in holding that the Texas two-year limitations period applicable to state-law claims under section 35.47 of the Texas Business and Commerce Code also applied to the TCPA claims).

generally, are that the "opt-out" interpretation gives greater deference to the *Supremacy Clause*, *id.* at 382, and the "opt-in" position is "inefficient and ineffective" considering Congress's intention to help states regulate unsolicited interstate faxes. *Id.* at 380. We examine each of these considerations in turn.

The court of appeals rejected the "acknowledgment" notion that the *Supremacy Clause* mandates unconditional state enforcement of private TCPA damage claims because of internal inconsistencies in the statutory language such an interpretation would create. *Id.* at 381-82. If Congress wished to unconditionally mandate TCPA enforcement in state courts, the court of appeals explained, it could easily do so by amending the TCPA and preempting state statutes to the contrary. *Id.* at 382. But at the same time, by construing the TCPA private right of action as mandatory unless a state legislatively declines enforcement, it appears the court of appeals attempted to give a nod to *Supremacy Clause* concerns. *Id.* Of course, Congress's ability to clarify the extent of its mandate by amending the statute is the same whether the proviso is construed as "acknowledgment," "opt-out," or "opt-in." More importantly, as we have said, the TCPA defines the federal cause of action with a prominent proviso; giving effect to the proviso that Congress created cannot run afoul of the *Supremacy Clause*. Having concluded that Congress intended the statutory proviso to have some conditional effect, be it "opt-out" or "opt-in," we fail to see how *Supremacy Clause* concerns are implicated at all.

The court of appeals also reasoned that the "opt-in" approach does not comport with Congress's purpose to help states regulate and penalize illegal fax advertisements by overcoming their inability to regulate interstate faxes. *Id.* at 380. The court posited that there would be no reason for Congress to create a statutory remedy that would allow states to regulate illegal interstate faxes but at the same time prohibit them from doing so until the state enacted enabling legislation; such a result would be, the court concluded, "inefficient and ineffective." *Id.* (citing *Aronson*, 51 Pa. D. & C.4th at 429).

This interpretation, though, ignores the unique nature of the federal right of action the TCPA created. Rather than make federal court jurisdiction over private TCPA claims concurrent with that of state courts, Congress chose to make the private remedy available exclusively through state-court proceedings. Such a conscious decision was undoubtedly due, at least in part, to the estimated eighteen million telemarketing calls made daily. Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2(3), 105 Stat. 2394 (1991); *see Int'l Sci. & Tech. Ins., Inc. v. Inacom, Commc'ns, Inc.*, 106 F.3d 1146, 1157 (4th Cir. 1997). Understandably, Congress opted to close federal courts to the millions of potential private TCPA claims since the overwhelming locus of regulation was centered in the states. *Int'l Sci.*, 106 F.3d at 1154. It is not unreasonable to presume, then, that Congress recognized the potential burden on state courts these claims could present. "Congress acted rationally in both closing federal courts and allowing states to close theirs to the millions of private actions that could be filed if only a small portion of each year's 6.57 billion telemarketing

transmissions were illegal under the TCPA." *Id.* Considering the potential burden on state court resources a flood of private TCPA claims might present, it is logical that Congress would choose to allow the states themselves to have some voice in the matter. *Id.* (holding "that private actions under the TCPA may be permitted in some state courts and prohibited in others, *as determined by the states*, does not render the TCPA violative of the equal protection component of the *Fifth Amendment's Due Process Clause*") (emphasis added). "States thus retain the ultimate decision of whether TCPA actions will be cognizable in their courts." *Id.* at 1158.

We think it significant that the reason Congress created the TCPA private right of action at all was "out of solicitude for states which were thwarted in their attempts to stop unwanted telemarketing." *Id.* at 1154. Congress noted in the TCPA: "Over half the States have statutes restricting various uses of the telephone for marketing, but telemarketers can evade their prohibitions through interstate operations; therefore, Federal law is needed to control residential telemarketing practices." Telephone Consumer Protection Act of 1991, PUB. L. NO. 102-243, § 2(7), 105 Stat. 2394 (1991). The principal motivation behind the TCPA strongly suggests that its remedies were meant to enhance the states' existing attempts to regulate unsolicited calls and faxes. As the Fourth Circuit noted, "although Congress created the private TCPA action, it was from the beginning a cause of action in the states' interest." *Int'l Sci.*, 106 F.3d at 1154. There is strong evidence that Congress wanted to assist state regulation in reaching interstate communications if a state so desired, not to create an independent regulatory framework for a potential flood of individual state-court lawsuits.

In sum, we do not believe the *Supremacy Clause* concerns and purported inefficiencies that some courts have perceived in adopting an "opt-out" approach are valid in light of the explicit statutory proviso and the TCPA's purpose to supplement state efforts to regulate unsolicited faxes. Instead, we consider the Congressional intent underlying the TCPA, as expressed in the statutory proviso and legislative history to favor the "opt-in" interpretation.

3. The "Opt-in" Interpretation

We must begin with the text of the statutory proviso. *See New York State Conf. of Blue Cross and Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655, 115 S. Ct. 1671, 131 L. Ed. 2d 695 (1995) (in determining congressional intent, analysis begins with interpretation of the statutory text and "moves on, as need be, to the structure and purpose of the Act in which it occurs"); *Mitchell Energy Corp. v. Ashworth*, 943 S.W.2d 436, 438, 40 Tex. Sup. Ct. J. 501 (Tex. 1997) (noting that in construing a statute, a court's primary objective is to give effect to the Legislature's intent by considering the plain meaning of the enactment). Our challenge in this case is discerning the level of deference to the states embodied in the phrase "if otherwise permitted by the laws or rules of court of a State." 47 U.S.C. § 227(b)(3).

We believe the requirement that states must "otherwise permit" a private right of action before a TCPA claim is cognizable in their courts can only mean that the TCPA alone does not create an immediately enforceable right. The term "otherwise" denotes "(1) in a different way or manner: DIFFERENTLY; (2) in different circumstances: under other

conditions." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1961). And "permit" is defined as "(1) to consent to expressly or formally: grant leave for or the privilege of: ALLOW, TOLERATE; (2) to give (a person) leave: AUTHORIZE; . . . (4) to make possible." *Id.* Use of the words "otherwise permitted," then, suggests the necessity of affirmative state action to activate the TCPA's private cause of action.

Congressional intent underlying the TCPA also supports an "opt-in" reading of the statutory proviso. As we have said, the federal legislation was intended to supplement state regulation, and Congress was surely conscious that state courts could suddenly be burdened with a potential flood of unsolicited-fax suits. It is clear that Congress intended significant deference to states, allowing them to determine whether to entertain the private TCPA claims that Congress decided to make exclusively actionable in state court. *Int'l Sci.*, 106 F.3d at 1156.[8] We believe the "if otherwise permitted" language Congress crafted in creating the federal

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8. *International Science* has sometimes been cited to favor an "opt-out" interpretation of the TCPA's "if otherwise permitted" language. *See, e.g., Hooters*, 537 S.E.2d at 470. We do not read the court's analysis as doing so *International Science* was decided before the debate over the statutory proviso's import commenced and merely decided the jurisdictional question of whether federal courts could entertain private TCPA claims. *See R.A. Ponte Architects v. Investors' Alert*, 149 Md. App. 219, 815 A.2d 816, 824 n.7, *rev'd*, 382 Md. 689, 857 A.2d 1 (stating "the [Fourth Circuit] was not called upon to decide, and did not decide, whether 'unless otherwise permitted' means that states must 'opt-out' or 'opt-in' to Congress's grant of the private right of action"). Significantly, the Fourth Circuit never

(Cont'd)

TCPA private right of action indicates deliberate deference to an area of uniquely state concern. *Id.*

It is true, as the plaintiffs assert, that "the statute's intended and most important purpose [is] to swiftly 'wipe out unsolicited facsimile advertising." But we believe Congress hinged the swiftness of the federal legislation on the willingness of states to bear the burden and cost of overseeing these claims. After all, the TCPA provides a federal enforcement mechanism by which state attorneys general may protect residents if the state wishes to direct state resources elsewhere:

> If state residents would prefer their government to devote its attention and resources to problems other than those deemed important by Congress, they may choose to have the Federal Government rather than the State bear the expense [and administrative burden] of [the TCPA]. . . .Where Congress [thus] encourages state regulation rather than compelling it, state governments remain responsive to the local electorate's preferences; state officials remain accountable to the people.

(Cont'd)
noted the opt-in/opt-out dichotomy. In any event, it is not at all clear that *International Science* supports an "opt-out" interpretation, as language in the opinion can as well be read to support an "opt-in" interpretation. *Int'l Sci.*, 106 F.3d at 1150-52 (stating state-court jurisdiction over private suits is "subject to their consent," and that private actions may be brought in state court "so long as the states allow such actions").

Int'l Sci., 106 F.3d at 1158 (quoting *New York v. United States*, 505 US. 144, 168, 112 S. Ct. 2408, 120 L. Ed 2d 120 (1992)). Thus, that the Texas Legislature did not specifically authorize a private right of action for unsolicited faxes until 1999 does not mean that Texas residents were without recourse; they were free to encourage the Texas Attorney General to pursue TCPA injunctive and other relief on their behalf. *See* 47 USC. § 227(f)(1)-(2).

Plaintiffs further contend an "opt-in" interpretation would render the TCPA's preemption language meaningless. Section 227(e) provides that the TCPA does not preempt state laws imposing more restrictive requirements or even prohibiting the use of telemarketing equipment. 47 U.S.C. § 227(e). Plaintiffs claim the negative implication suggests that less restrictive penalties are indeed preempted. If the TCPA were inoperative absent enabling legislation, the plaintiffs assert, then the TCPA could not preempt less restrictive state law and the section would be rendered meaningless. Of course, the same argument would apply to the "opt-out" approach; if a state opted out then the preemption language would be equally meaningless. Only an "acknowledgment" interpretation, which we have rejected, would give fill effect to subsection (e) if in fact it were intended to preempt less restrictive state penalties. But we do not agree with the plaintiffs' reading of section 22 7(e).

First, we note that section 227(e)(1) is specifically titled "State law *not preempted*." 47 U.S.C § 227(e)(1,) (emphasis added). Furthermore, Congress's intent to supplement state legislation explains why the preemption concern would have focused on more aggressive regulation by the states. *See*

Chair King, 131 F.3d at 513 ("By creating a private right of action in state courts, Congress allowed states, in effect, to enforce regulation of interstate telemarketing activity."). Congress clearly did not intend the TCPA to establish a ceiling if states decided to be more aggressive in their approach, but it does not necessarily follow that Congress intended the TCPA to be a mandatory floor for private enforcement whether or not a state chose to allow it. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S. Ct. 2240, 135 L. Ed 2d 700(1996) ("In all preemption cases, and particularly in those [where] Congress has 'legislated . . . in a field which the States have traditionally occupied,' we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'"); *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. 767, 780, 67 S. Ct. 1026, 91 L. Ed. 1234 (1947) (internal citations omitted) ("Any indulgence in construction should be in favor of the States, because Congress can speak with drastic clarity whenever it chooses to assure full federal authority, completely displacing the States."). We reject the plaintiffs' contention that the TCPA's limited preemption language forecloses an "opt-in" interpretation.

III. Conclusion

We conclude that, because Texas did not otherwise permit a cause of action for the receipt of unsolicited fax advertisements until September 1, 1999, and the faxes at issue in this case were sent before that date, plaintiffs have no actionable claim. Because this conclusion is dispositive, we do not reach the parties' other arguments involving the limitations period applicable to TCPA claims and the application of Texas agency law under the facts presented here. Accordingly, we reverse the judgment of the court of appeals and render judgment in favor of GTE Mobilnet.

Harriet O'Neill

APPENDIX B — OPINION OF THE COURT OF APPEALS OF TEXAS, FOURTEENTH DISTRICT, HOUSTON RENDERED MAY 6, 2004, SUBSTITUTE OPINION FILED MAY 6, 2004

COURT OF APPEALS OF TEXAS, FOURTEENTH DISTRICT, HOUSTON

NO. 14-00-00711-CV

May 6, 2004, Rendered
May 6, 2004, Substitute Opinion Filed

THE CHAIR KING, INC., CHAIR KING, S.A., INC., JEROME KOSOY, M.D., M.E. FORD AND ASSOCIATES, BEAUTIQUE, INC., DISCOVERY SERVICES OF TEXAS, INC., VANTAGE SHOE WAREHOUSE, INC., COUNSELOR SYSTEMS, INC., POPE AND BOOTH, P.C., JEFFREY K. MUSKER, D.C., AND POPE ESCROW COMPANY,

APPELLANTS,

v.

GTE MOBILNET OF HOUSTON, INC. AND CHICK-FIL-A, INC.,

APPELLEES.

Appendix B

SUBSEQUENT HISTORY: Petition for review granted by *GTE Mobilnet of Houston, Inc. v. Chair King*, 2005 Tex. LEXIS 584 (Tex., Mar. 11, 2005) Reversed by *Chair King, Inc. v. GTE Mobilnet of Houston, Inc.*, 2006 Tex. LEXIS 97 (Tex., Feb. 3, 2006)

PRIOR HISTORY: On Appeal from the 152nd District Court. Harris County, Texas. Trial Court Cause No. 95-36004. *Chair King, Inc. v. GTE Mobilnet of Houston, Inc.*, 2004 Tex. App. LEXIS 780 (Tex. App. Houston 14th Dist., Jan. 29, 2004)

DISPOSITION: Motions for Rehearing Overruled; Affirmed in Part and Reversed and Remanded in Part.

COUNSEL: For Appellants: Julius Glickman, Thomas C. Wright, Chad M. Forbes, Houston, TX.

For Appellees: Anne Cohl Gravelle, Houston, TX, Jill Warren, Austin, TX, Kimberly Marie Phillips, Steve M. Zager, Houston, TX.

JUDGES: Panel consists of Justices Yates, Hudson, and Frost.

OPINIONBY: Kem Thompson Frost

Appendix B

OPINION
SUBSTITUTE OPINION

Opinion of January 29, 2004, Withdrawn and Substitute Opinion filed May 6, 2004.

We overrule the motions for rehearing filed by appellants and by appellee GTE Mobilnet of Houston, Inc. We withdraw the opinion issued in this case on January 29, 2004, and we issue the following opinion in its place.

This is a complicated case[1] in which we address several interesting and multi-faceted issues under the Telephone Consumer Protection Act, 47 U.S.C. § 227 ("TCPA"). Appellants, plaintiffs below, challenge the trial court's judgment dismissing their private damage claims under the TCPA and their common-law claims and granting appellees/defendants' no-evidence and traditional motions for summary judgment. We conclude that the trial court correctly granted summary judgment as to appellants' common-law claims, all of their claims against appellee Chick-Fil-A, Inc. ("Chick-Fil-A"), and the TCPA claims of appellants The Chair King, Inc., Chair King, S.A., Inc., M.E. Ford and Associates, Vantage Shoe Warehouse, Inc., Counselor Systems, Inc., Pope and Booth, P.C., and Pope Escrow Company. However, we reverse the trial court's judgment as to the TCPA claims of

1. In their appellate briefs, all parties assert that "this case is not complicated." The clerk's record in this summary-judgment appeal contains more than 14,700 pages. Taken together, the parties' appendices exceed 740 pages. In over 230 pages of appellate briefing, the parties have addressed more than a dozen legal issues, including one of apparent national first impression.

appellants Jerome Kosoy, M.D., Beautique, Inc., Discovery Services of Texas, Inc., and Jeffrey K. Musker, D.C. against appellee GTE Mobilnet of Houston, Inc. ("GTE Mobilnet") and remand these claims for further proceedings consistent with this opinion.

I. FACTUAL AND PROCEDURAL BACKGROUND

Appellants The Chair King, Inc., Chair King, S.A., Inc., Jerome Kosoy, M.D., M.E. Ford and Associates, Beautique, Inc., Discovery Services of Texas, Inc., Vantage Shoe Warehouse, Inc., Counselor Systems, Inc., Pope and Booth, P.C., Jeffrey K. Musker, D.C., and Pope Escrow Company (collectively referred to herein as the "Recipients") allege they are individuals or entities engaged in commercial, professional, or personal matters in and around various major metropolitan areas of Texas, including Houston, Dallas, San Antonio, and Austin. The Recipients assert that, from as early as 1992, they have received numerous unsolicited fax advertisements on their fax machines.

Some of the fax communications in question were disseminated by AdverFax, a now defunct company that was formerly in the business of sending out fax advertisements for other businesses.[2] AdverFax targeted recipients whom it perceived would be likely to buy its clients' products or services and then sent advertisements or coupons via fax to these targets. To facilitate its operations, AdverFax divided Houston into zones, each of which contained facsimile numbers for that geographic area. AdverFax maintained a

2. After the Recipients filed suit against AdverFax, AdverFax ceased its operations.

database containing fax numbers, sorted according to zone, which enabled AdverFax's customers to send faxed advertisements to all of the fax numbers in any chosen geographic zone. With its customers' authorization, AdverFax sent fax advertisements to the numbers in its database pertaining to the requested zones. The summary-judgment evidence shows that Adverfax sent out large numbers of faxed advertisements for its customers' products and services. In 1995, the Recipients filed suit against GTE Mobilnet in the United States District Court for the Sourthern District of Texas (the "Federal Suit"). Although the Recipients named several defendants (including GTE Mobilnet) in that suit, Chick-Fil-A was not among them. The United States Court of Appeals for the Fifth Circuit ultimately determined that the federal court lacked subject-matter jurisdiction. *See Chair King, Inc. v. Houston Cellular Corp.*, 131 F.3d 507, 509 (5th Cir.1997). The Federal Suit was then dismissed.

The Recipients filed this case in Harris County District Court in 1995. On March 11, 1998, the Recipients added GTE Mobilnet and Chick-Fil-A (collectively referred to herein as the "Advertisers") to this case, suing Chick-Fil-A for the first time. The Recipients alleged that numerous fax-advertising companies (including AdverFax) as well as the Advertisers and many other businesses who also retained these fax-advertising companies had sent unsolicited fax advertisements to the Recipients.[3] The Recipients asserted the following claims: (1) a private damage claim under the

3. The Recipients brought their claims seeking class-action certification for both a plaintiffs' class and a defendants' class. The trial court did not rule on the class-certification issue, and that issue is not before this court.

TCPA; (2) negligence; (3) negligence per se; (4) invasion of privacy; (5) trespass to chattels; and (6) gross negligence. The Recipients also alleged that the defendant advertisers had engaged in a conspiracy with their respective fax-advertising companies to send unsolicited fax advertisements.

The defendants filed a joint motion for summary judgment asserting the following grounds:

(1) The damages claims under the TCPA are barred because, at the time the faxes in question were sent, Texas had not authorized the filing of private damage claims under the TCPA in Texas courts;[4]

(2) The TCPA does not apply to any faxes sent solely within Texas;

(3) If the TCPA does apply to intrastate faxes, then Congress lacked the power to enact the TCPA under the *Commerce Clause of the United States Constitution*;

(4) The TCPA's minimum damages provision violates due process under the United States and Texas Constitutions because it is grossly disproportionate to any damage suffered by the Recipients;

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4. The Texas Legislature did enact such a statute, and it took effect on September 1, 1999. See Act of May 26, 1999, 76th Leg., R.S., ch. 635, § § 1-3, 1999 Tex. Gen Laws 3203 (codified at Tex. Bus. & Comm.Code § 35.47(c)-(g)). However, this statute does not apply to communications made before September 1, 1999. *See id.* at § § 2, 3.

(5) The TCPA violates the defendants' free-speech rights under the United States and Texas Constitutions;

(6) The TCPA violates the *Equal Protection Clause of the United States Constitution* because it unfairly discriminates against fax advertisements based on the content of their protected speech;

(7) The receipt of unsolicited fax advertisements does not constitute an invasion of privacy;

(8) The Recipients do not possess any right to privacy;

(9) Receipt of unsolicited fax advertisements does not constitute a trespass to chattels;

(10) The conduct about which the Recipients complain, as a matter of law, does not constitute negligence, gross negligence or negligence per se; and

(11) Because all of the Recipients' underlying claims fail, as a matter of law, their conspiracy claims also fail.

After the trial court denied this joint motion, GTE Mobilnet filed a separate motion for summary judgment and a supplemental motion asserting the following grounds:

(1) GTE Mobilnet allegedly did not send the faxes in question to the Recipients; rather they were sent by independently owned and operated agents;

(2) Jerome Kosoy, M.D. is a GTE Mobilnet customer so his consent to receive fax advertising from GTE Mobilnet is allegedly implied;

(3) The Recipients' claims are barred by the statute of limitations;

(4) There is no evidence GTE Mobilnet sent unsolicited fax advertisements to any of the Recipients; and

(5) There is no evidence to support the essential elements of the Recipients' common-law claims.

Chick-Fil-A also filed an individual motion for summary judgment and asserted the following grounds:

(1) The two-year statute of limitations under section 16.003 of the Texas Civil Practice and Remedies Code bars all of the Recipients' claims;

(2) Chick-Fil-A did not use its fax machines to send faxes to the Recipients and there was no agency relationship between Chick-Fil-A and the fax-advertising companies that sent faxes to the Recipients;

(3) There is no evidence to support the essential elements of the Recipients' common-law claims; and

(4) Chick-Fil-A is not liable for the actions of its independent franchisees.

Appendix B

The Recipients filed responses to both the joint motion for summary judgment and the individual motions, and they also filed their own motion for a partial summary judgment relating to certain aspects of their TCPA claims against certain defendants, including the Advertisers.

After granting summary-judgment motions dismissing the Recipients' claims against certain defendants, the trial court reconsidered its ruling on the joint motion for summary judgment, granted the joint motion, and also granted the individual motions for summary judgment of the remaining defendants, including the Advertisers. The trial court also denied the Recipients' motion for partial summary judgment. Both in the trial court and on appeal, the Recipients settled with various defendants, so that only GTE Mobilnet and Chick-Fil-A remain as defendants/appellees in this case.

On appeal, the Recipients assert the trial court erred by granting the joint motion for summary judgment and the individual motions of GTE Mobilnet and Chick-Fil-A as well as by denying the Recipients' motion for partial summary judgment.

II. STANDARDS OF REVIEW

In reviewing a traditional motion for summary judgment, we take as true all evidence favorable to the non-movant, and we make all reasonable inferences in the non-movant's favor. *Dolcefino v. Randolph*, 19 S.W.3d 906, 916 (Tex.App.-Houston [14th Dist.] 2000, pet. denied). If the movant's motion and summary-judgment evidence facially establish its right to judgment as a matter of law, the burden shifts to

the non-movant to raise a genuine, material fact issue sufficient to defeat summary judgment. *Id.*

In reviewing a no-evidence motion for summary judgment, we ascertain whether the non-movant produced any evidence of probative force to raise a genuine issue of fact as to the essential elements attacked in the no-evidence motion. *Id.* We take as true all evidence favorable to the non-movant, and we make all reasonable inferences therefrom in the non-movant's favor. *Id.* A no-evidence motion for summary judgment must be granted if the party opposing the motion does not respond with competent summary-judgment evidence that raises a genuine issue of material fact. *Id.* at 917. Because the trial court did not specify the grounds for its ruling, we will affirm if any of the grounds advanced in the motion has merit. *See Carr v. Brasher,* 776 S.W.2d 567, 569 (Tex.1989).

We review the trial court's interpretation of applicable statutes *de novo. Johnson v. City of Fort Worth,* 774 S.W.2d 653, 655-56 (Tex.1989). In construing federal statutes, we look first at the language of the entire statute to determine if the language in question has a plain and unambiguous meaning regarding the issue before us. *See Barnhart v. Sigmon Coal Co.,* 534 U.S. 438, 450, 122 S.Ct. 941, 950, 151 L.Ed.2d 908 (2002). The inquiry stops if the statutory language is unambiguous and "the statutory scheme is coherent and consistent." *Id.* (quotations omitted). If the relevant statutory language is ambiguous and if no agency responsible for implementing the statute has interpreted the language, then we seek guidance in the statutory structure, relevant legislative history, and congressional purposes in

enacting the TCPA.[5] *See Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 737, 105 S.Ct. 1598, 1603, 84 L.Ed.2d 643 (1985); *Blum v. Stenson*, 465 U.S. 886, 896, 104 S.Ct. 1541, 1548, 79 L.Ed.2d 891 (1984). We read the words of a statute in their context, taking note of their place in the overall statutory scheme. *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, 120 S.Ct. 1291, 1301, 146 L.Ed.2d 121 (2000) (citations and quotations omitted). In doing so, we must interpret the statute as a "symmetrical and coherent regulatory scheme" and, if possible, fit all parts into a "harmonious whole." *Id.* We must construe the language of the TCPA, if possible, so that no word is rendered meaningless or insignificant. *TRW Inc. v. Andrews*, 534 U.S. 19, 31, 122 S.Ct. 441, 449, 151 L.Ed.2d 339 (2001).

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5. If an agency responsible for implementing the TCPA has interpreted the statutory language at issue, then the reviewing court gives deference to that agency's reasonable interpretation of the relevant language. *See United States v. Mead Corp.*, 533 U.S. 218, 227-28, 121 S.Ct. 2164, 2171-72, 150 L.Ed.2d 292 (2001). As explained below, we find that the Federal Communications Commission has not interpreted the language at issue in this case, so this aspect of the standard of review does not apply to this case.

Appendix B

III. ANALYSIS

A. Are the Recipients' TCPA damage claims barred because, at the time the faxes in question were sent, Texas had not authorized the filing of damage actions under the TCPA in Texas courts?

One of the Advertisers' grounds for summary judgment was that the Recipients' private damage claims under the TCPA are barred because the TCPA requires a state to authorize damage actions under the TCPA before these claims may be asserted. As noted above, Texas did not specifically authorize the filing of these private damage claims in its courts until September 1, 1999, and the statute containing this authorization does not apply to the fax advertisements in question because they were sent before September 1, 1999. *See* Act of May 26, 1999, 76th Leg., R.S., ch. 635, § § 1-3, 1999 Tex. Gen. Laws 3203 (codified at Tex. Bus. & Comm.Code § 35.47(c)-(g)). To frame our statutory analysis relating to this legal issue and the other TCPA issues before the court, we begin with an examination of the relevant language and the possible interpretations of this federal statute.

1. The Statutory Language and the Possible Interpretations

The first summary-judgment ground we must consider turns on the interpretation of the following statutory language, upon which the Recipients base their TCPA damage claim:

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Private right of action. A person or entity may, *if otherwise permitted by the laws or rules of court of a State,* bring in an appropriate court of that State-

(A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater, or

(C) both such actions.

...

47 U.S.C. § 227(b)(3) (emphasis added).

In addition to providing this private right of action under section 227(b)(3), the TCPA also authorizes any state attorney general to bring civil actions on behalf of its state's residents to obtain an injunction against such unsolicited fax advertisements and to recover the same monetary damages that may be recovered under section 227(b)(3). *See* 47 U.S.C. § § 227(b)(3) & (f)(1). The TCPA provides that federal district courts have exclusive jurisdiction over actions brought by state attorneys general. 47 U.S.C. § 227(f)(2). Finally, the TCPA also authorizes the Federal Communications Commission ("FCC") to intervene as of right in any state attorney general's action. *See* 47 U.S.C. § 227(f)(3).

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Federal courts of appeals uniformly have determined that private TCPA damage claims may be brought only in state courts. *See Murphey v. Lanier,* 204 F.3d 911, 913-15 (9th Cir.2000) (agreeing with five other circuit courts of appeals that federal courts have no jurisdiction over private damage claims under the TCPA). The critical language in section 227(b)(3) is "if otherwise permitted by the laws or rules of court of a State." At least three different interpretations of this language have developed regarding the circumstances under which a claimant may bring a TCPA damage claim in state court. *See* Robert R. Biggerstaff, *State Courts and the Telephone Consumer Protection Act of 1991: Must States Opt In? Can States Opt Out?* 33 Conn. L.Rev. 407, 412-13 (2001). These three interpretations, which we refer to as "opt-in," "opt-out," and "acknowledgment," each produce different results when applied to the Recipients' TCPA claims.

The "Opt-In" Interpretation

Under the "opt-in" interpretation espoused by the Advertisers, private TCPA damage claims cannot be brought in a state's courts until that state's legislature enacts legislation or that state's highest court promulgates court rules that specifically permit these claims to be filed in that state's courts. *See Autoflex Leasing, Inc. v. Mfrs. Auto Leasing,* 16 S.W.3d 815, 817 (Tex.App.-Fort Worth 2000, pet. denied) (holding that, under plain meaning of 47 U.S.C. § 227(b)(3), TCPA damage claims cannot be asserted in a state's court until these claims are expressly permitted by state legislation or state court rule and that such claims may not be brought in Texas unless the alleged violation occurred

on or after September 1, 1999, when a statute took effect authorizing these claims). This view has been adopted by the only Texas court to address the issue. However, courts from nine other states have rejected the opt-in interpretation.[6] *See Lary v. Flasch Bus. Consulting*, No. 2020803, 878 So.2d ——, ——, 2003 WL 22463948, at *2-*5 (Ala.Civ.App. Oct.31, 2003) (holding that a state's legislative or judicial authorities need not "opt in" for the state's courts to entertain private damage claims under the TCPA); *Condon v. Office Depot, Inc.*, 855 So.2d 644, 645-48 (Fla.Dist.Ct.App.2003) (same); *Kaufman v. ACS Sys., Inc.*, 110 Cal.App.4th 886, 2 Cal.Rptr.3d 296, 306-12 (2003) (holding TCPA provides for private damage claims in state court unless prohibited by the state); *Reynolds v. Diamond Foods & Poultry, Inc.*, 79 S.W.3d 907, 908-10 (Mo.2002) (holding state enabling legislation is not required to assert private damage claims under the TCPA); *Zelma v. Market U.S.A.*, 343 N.J.Super. 356, 778 A.2d 591, 593-98 (2001) (holding no affirmative

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6. In support of their argument in this regard, the Advertisers also have cited an unpublished ruling by a United States District Court that state legislation authorizing TCPA damage claims is required before claimants in that state may file suit. *See Nicholson v. Hooters of Augusta, Inc.*, 136 F.3d 1287, 1288 (11th Cir.1998) (describing district court "opt-in" ruling), modified in part by 140 F.3d 898 (11th Cir.1998). However, this ruling was vacated by the United States Court of Appeals for the Eleventh Circuit, which held that federal courts have no subject-matter jurisdiction over private damage claims under the TCPA. *See id.* at 1290. The Advertisers also cite dicta in Murphey v. Lanier, in which the Ninth Circuit, in the course of finding no federal jurisdiction over private damage claims under the TCPA, states that these claims can be litigated in state court only if the state consents. *See* 204 F.3d 911, 914 (9th Cir.2000).

act by legislature or highest state court was necessary for trial court to entertain private damage claims under the TCPA); *Worsham v. Nationwide Ins. Co.*, 138 Md.App. 487, 772 A.2d 868, 871-74 (2001) (stating, in context of damage action under 47 U.S.C. § 227(c)(5), which has same "if otherwise permitted" language, that state courts have jurisdiction over private TCPA claims in the absence of a state statute declining to exercise jurisdiction over TCPA claims); *Aronson v. Fax.com, Inc.*, 51 Pa. D. & C. 4th 421, 423-36 (Ct.Com.Pl.2001) (adopting "opt-out" rather than "opt-in" construction of 47 U.S.C. § 227(b)(3)); *Hooters of Augusta, Inc. v. Nicholson*, 245 Ga.App. 363, 537 S.E.2d 468, 470-71 (2000) (same as *Aronson*); *Schulman v. Chase Manhattan Bank*, 268 A.D.2d 174, 710 N.Y.S.2d 368, 370-72 (N.Y.App.Div.2000); *see also International Science & Tech. Inst. v. Inacom Communications, Inc.*, 106 F.3d 1146, 1156-58 (4th Cir.1997) (same as *Aronson* in context of finding no subject-matter jurisdiction in federal court). If states do not need to affirmatively enact a statute or promulgate a court rule allowing private TCPA damage actions for claimants to file suit in state court, there are at least two other possible interpretations.

The "Opt-Out" Interpretation

Under a second interpretation, states may have the ability to "opt out" by passing a statute declining to entertain TCPA damage actions in that state's courts. *See International Science & Tech. Inst.*, 106 F.3d at 1156-58; *Hooters of Augusta, Inc.*, 537 S.E.2d at 470-71. This interpretation points to the concern about a potential flood of private TCPA actions in state courts, burdening state courts with exclusive

state-court jurisdiction over a federal damage claim that may have had no previous counterpart under state law. *See International Science & Tech. Inst.*, 106 F.3d at 1158 (stating that "[i]n creating a conditional right of action to enforce the TCPA in state courts, Congress neither exceeded its delegated powers nor invaded the province of state sovereignty, which still may be exercised to prohibit the action ... Congress enacted the TCPA to assist states where they lacked jurisdiction ... and it recognized state power to reject Congress' [sic] authorization").

The "Acknowledgment" Interpretation

Under a third interpretation, states may not "opt out" because the *Supremacy Clause of the United States* Constitution requires them to provide a judicial forum for prosecution of private TCPA damage claims. Under this interpretation, the language of the TCPA simply acknowledges the states' rights to structure their court systems and apply neutral state-court procedural rules. *See Schulman*, 710 N.Y.S.2d at 372 (concluding that "the phrase 'if otherwise permitted by the laws or rules of court of a State' merely acknowledges the principle that states have the right to structure their own court systems and that state courts are not obliged to change their procedural rules to accommodate TCPA claims"); Biggerstaff, *supra*, at 416-46. To date, it does not appear that any state has enacted a statute that explicitly refuses to allow private TCPA damage claims in that state's courts. *See* Biggerstaff, *supra*, at 416. The only court to date whose holding directly contradicts the acknowledgment interpretation is *R.A. Ponte Architects, Ltd. v. Investors' Alert, Inc. See* 149 Md.App. 219, 815 A.2d 816,

827 (2003) (holding that Maryland had "opted out" of TCPA damage claims by enacting in 1989-two years before the enactment of the TCPA-a state statute regarding unsolicited fax advertisements without allowing for private damage claims), *cert. granted,* 374 Md. 358, 822 A.2d 1224 (2003); *contra Condon,* 855 So.2d at 648 (holding Florida did not "opt out" of TCPA by, prior to enactment of TCPA, passing statutes regulating unsolicited fax advertisements without allowing for private damage claims); *and Hooters of Augusta, Inc.,* 537 S.E.2d at 471-72 (same as *Condon* for Georgia).

After scrutinizing the wording of the TCPA, we conclude that the relevant language of this statute does not have a plain and unambiguous meaning regarding the issues in this case. *See Barnhart,* 534 U.S. at 450, 122 S.Ct. at 950; *Condon,* 855 So.2d at 647 (stating that the "if otherwise permitted" language is ambiguous); Biggerstaff, *supra,* at 446 (stating that "significant ambiguity" exists in the statute); *but see Autoflex Leasing,* 16 S.W.3d at 817. Having found the relevant statutory language to be ambiguous, we now seek guidance in the relevant legislative history and consider the congressional purposes in enacting the TCPA. *See Florida Power & Light Co.,* 470 U.S. at 737, 105 S.Ct. at 1603.

2. Legislative History of the TCPA

From 1989 to 1991, Congress considered various bills addressing the telemarketing practices made possible by technological innovations, including the transmission of advertisements by fax, i.e., sending the advertisement in electronic form along a telephone line so that it is printed on paper at the receiving end. In the process, Congress held three

hearings and produced three committee reports. The final bill combined features of three previous bills. *Kaufman,* 2 Cal.Rptr.3d at 306-12.

In drafting the bills, Congress became aware of several problems associated with unsolicited fax advertisements. *See Telemarketing Practices: Hearing on H.R. No. 628, H.R. No. 2131, and H.R. No. 2184 Before the Subcomm. on Telecomms. and Fin. of the House Comm. on Energy and Commerce,* 101st Cong., 1st Sess., at 54-57 (1989) (hereinafter "*Telemarketing Practices* "); H.R.Rep. No. 102-317, 1st Sess., at 25 (1991). "Since businesses [had] begun to express concern about the interference, interruptions and expenses that junk fax [es] ... placed upon them, states [were] taking action to eliminate these telemarketing practices. [Two states had] enacted laws banning the use of facsimile machines for unsolicited advertising. Similar bills [were] ... pending in the legislatures of about half the states." H.R.Rep. No. 102-317, 1st Sess., at 25 (1991).

"[State laws] had limited effect, however, because States do not have jurisdiction over interstate calls. Many States ... expressed a desire for Federal legislation to regulate interstate telemarketing calls to supplement their restrictions on intrastate calls." Sen. Rep. No. 102-178, 1st Sess., at 3 (1991), *reprinted in* 1991 U.S.C.C.A.N., at 1970. "[B]usiness owners [were] virtually unanimous in their view that they [did] not want their fax lines tied up by advertisers trying to send messages." *Telemarketing Practices, supra,* at 54-55 (footnotes omitted). "Extensive research ... revealed no case of a company (other than those advertising via fax) which oppose[d] legislation restricting advertising via fax." *Id.* at

54 n. 35. As a state legislator from Utah put it, " 'You get a message you didn't want from people you don't know on paper they didn't buy.' " *Id.* at 54 (statement of Rep. Ken Jacobsen).

Richard Kessel, a New York state official, spearheaded the movement to ban unsolicited fax advertisements in his state after he was unable to fax a document to the governor's office which, at the time, was processing an incoming advertisement. *See Telemarketing Practices, supra,* at 55. "The last thing you want when you're trying to meet a deadline, or trying to get a memo to your boss ... is to be disturbed by someone trying to sell draperies or submarine sandwiches." *Id.* In hearings held in 1991, the co-founder of the Center for the Study of Commercialism, Michael Jacobson, described the "numerous nuisance faxes" he had received and complained that they "not only use the recipient's paper, but also prevent faxes from being sent out and prevent legitimate faxes from coming in." Hearing on Sen. No. 1462, Sen. No. 1410, and Sen. No. 857 *Before the Subcomm. on Communications of the Sen. Comm. on Commerce, Science, and Transp.,* 102d Cong., 1st Sess., 41 (1991) (statement of Michael Jacobson).

The legislative counsel for the American Civil Liberties Union, Janlori Goldman, told the House subcommittee, "we ... support the ... limits on fax machines, in terms of sending unsolicited advertising. We think that because of the burden that is placed on the individual who has to pay for the cost of the communication, that that then justifies [a] broader ban [than that placed on telephone solicitations]." *Telemarketing/Privacy Issues: Hearing on H.R. No. 1304 and H.R. No. 1305*

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Before the Subcomm. on Telecomms. and Fin. of the House Comm. on Energy and Commerce, 102d Cong., 1st Sess., at 47. The subcommittee was well aware that a "festering problem [had] arisen from the so-called 'junk fax.' Junk fax is more than merely irritating. It represents an unfair shifting of the cost of advertising from the advertiser to the unwitting customer.... [U]nsolicited and unwanted faxes can tie up a machine for hours and thwart the receipt of legitimate and important messages." *Id.* at 3-4.

Congress recognized that, although considered "[a]n office oddity during the mid 1980s, the facsimile machine has become a primary tool for business to relay instantaneously written communications and transactions." H.R.Rep. No. 102-317, 1st Sess., 10 (1991). By 1991, millions of offices in the United States were sending more than thirty billion pages of information by fax each year in an effort to speed communications and cut overnight delivery costs. *Id.* But "the proliferation of fax machines has been accompanied by explosive growth in unsolicited facsimile advertising, or 'junk fax.' " *Id.* at 10. "Facsimile machines are designed to accept, process, and print all messages ... The fax advertiser takes advantage of this basic design by sending advertisements to available fax numbers, knowing that [they] will be received and printed by the recipient's machine. This type of telemarketing is problematic for two reasons. First, it shifts some of the costs of advertising from the sender to the recipient. Second, it occupies the recipient's facsimile machine so that it is unavailable for legitimate business messages while processing and printing the junk fax." H.R.Rep. No. 102-317, *supra,* at 10. "[W]hen a facsimile machine is receiving a fax, it may require several

minutes or more to process and print the advertisement." *Id.* at 25. "Only the most sophisticated and expensive facsimile machines can process and print more than one message at a time." *Id.*

"When an advertiser sends marketing material to a potential customer through regular mail, the recipient pays nothing to receive the letter." *Id.* But the recipient of fax advertisements "assumes both the cost associated with the use of the facsimile machine and the cost of the expensive paper used to print out facsimile messages." *Id.* "[T]hese costs are borne by the recipient[s] of the fax advertisement regardless of their interest in the product or service being advertised." *Id.; see also* Sen. Rep. No. 102-178, 1st Sess., at 2 (1991), *reprinted in* 1991 U.S.C.C.A.N., at 1969.

Senator Ernest Hollings of South Carolina, the sponsor of the TCPA, in urging its passage, made the following statements regarding the civil damage provisions of the TCPA:

The ... [Act] contains a private right-of-action provision that will make it easier for consumers to recover damages from receiving these computerized calls. The provision would allow consumers to bring an action in State court against any entity that violates the [Act]. The [Act] does not, because of constitutional constraints, dictate to the States which court in each State shall be the proper venue for such an action, as this is a matter for State legislators to determine. Nevertheless, it is my hope that States will make it as easy as possible for consumers to bring such actions, preferably in small claims court.... Small claims court or a similar court

would allow the consumer to appear before the court without an attorney. The amount of damages in this legislation is set to be fair to both the consumer and the telemarketer. However, it would defeat the purposes of the [Act] if the attorneys' costs to consumers of bringing an action were greater than the potential damages. I thus expect that the States will act reasonably in permitting their citizens to go to court to enforce this [Act].

137 Cong. Rec. S16205-16206 (daily ed. Nov. 7, 1991) (statement of Sen. Hollings).

Congress enacted the TCPA in November of 1991. The measure was signed into law on December 20, 1991. Section 227(b) of the Act makes it "unlawful for any person within the United States ... to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine." 47 U.S.C. § 227(b)(1)(C). The TCPA defines "unsolicited advertisement" as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission." 47 U.S.C. § 227(a)(4).

3. The Advertisers' Arguments for the "Opt In" Interpretation

The Advertisers assert that Texas can permit private TCPA damage claims in its courts only by enacting legislation that specifically authorizes these claims. In support of this assertion, the Advertisers argue that the following substantiates the opt-in interpretation: (1) the *Autoflex*

Leasing, Inc. case; (2) Senator Hollings's remarks; (3) dictionary definitions; (4) other instances of the use of the phrase "otherwise permitted" in the United States Code; (5) Congress's ability to enact a clearer statute if it intended either the opt-out interpretation or the acknowledgment interpretation; and (6) the legislative history of the 1999 amendment to section 35.47 of the Texas Business and Commerce Code.

The Advertisers rely heavily on the *Autoflex Leasing, Inc.* case in which the Fort Worth Court of Appeals held that the "if otherwise permitted" language unambiguously requires a state to pass legislation or promulgate court rules allowing private TCPA damage actions before claimants may bring these claims in a state's courts. *See Autoflex Leasing, Inc.*, 16 S.W.3d at 817. After careful consideration of the language of the TCPA, the statutory structure, relevant legislative history, and the congressional purposes in enacting the TCPA, we respectfully disagree with the analysis of the *Autoflex Leasing, Inc.* court. *See Florida Power & Light Co.*, 470 U.S. at 737, 105 S.Ct. at 1603; *Blum*, 465 U.S. at 896, 104 S.Ct. at 1548. Instead, we conclude that the relevant language of the TCPA is ambiguous. *See Condon*, 855 So.2d at 647 (stating that the "if otherwise permitted" language is ambiguous); Biggerstaff, *supra*, at 446 (stating that "significant ambiguity" exists in the statute); *but see Autoflex Leasing*, 16 S.W.3d at 817. Furthermore, we do not find the federal cases cited by the *Autoflex Leasing, Inc.* court persuasive in resolving this issue.

Reviewing Senator Hollings's comments as a whole and in context, they do not address the issue of whether the opt-in interpretation is correct. *Condon*, 855 So.2d at 647-48;

Zelma, 778 A.2d at 596-97. Rather, Senator Hollings's comments show his concern about the bill's silence as to the proper state court in which claimants should bring TCPA damage claims and his hope that the states would make their small claims courts available for these claims so that a claimant might receive fast and efficient relief without having to retain a lawyer. *See Zelma*, 778 A.2d at 596-97; 137 Cong. Rec. S16205-16206 (daily ed. Nov. 7, 1991) (statement of Sen. Hollings).

Dictionary definitions do not clarify the ambiguity, but rather seem to confirm it. For example, one dictionary defines "permit" as "1: to consent to expressly or formally: grant leave for or the privilege of: Allow, Tolerate ... 2: to give (a person) leave: Authorize ..." Webster's Third New International Dictionary 1683 (1993 ed.). This definition seems to favor the Advertisers' position; however, it gives "allow" as a synonym and defines "allow" in pertinent part as meaning: "4: Permit ... a: to permit by way of concession ... b: to permit by neglecting to restrain or prevent ..." *Id.* at 58. The definition of this synonym weighs against the opt-in interpretation. The dictionary definitions show that the ordinary meaning of the relevant part of the TCPA is uncertain and that the TCPA does not unambiguously require states to expressly authorize TCPA damage claims.

The Advertisers also point to various federal statutes that contain the words "otherwise permitted" or "permitted" as support for the opt-in interpretation. However, the Advertisers do not cite any cases interpreting these statutes, and we do not find that the text of these statutes alone is helpful in interpreting the TCPA in this case. *See Zelma*, 778

A.2d at 595-96 (finding comparison of TCPA language with the language of other federal statutes not to be helpful).

The Advertisers also assert that, if Congress intended to achieve the results contemplated by the opt-out or acknowledgment interpretations, it could have done so directly and clearly by using other language. While this assertion is hardly debatable, it is also true that Congress could have more directly and clearly expressed any intent it had to require prior state authorization before allowing TCPA damage actions in state court. Therefore, this argument is neither convincing nor helpful in resolving the issue.

The Advertisers also cite part of the legislative history for the 1999 changes to section 35.47 of the Texas Business and Commerce Code, which states that "each state must decide whether to permit its citizens to bring civil actions for violations of the [TCPA]." House Research Org., Bill Analysis, Tex. H.B. 23, 76th Leg., R.S. (1999). First, this legislative history is consistent with both the opt-in and the opt-out interpretations.[7] Second, courts construing statutory language should give little weight to statements made by legislators after the enactment of the statute. *In re Jane Doe*, 19 S.W.3d 346, 352 (Tex.2000). Third, these statements regarding the TCPA were made eight years after its enactment

7. We note that at least one commentator has asserted that the Texas Legislature enacted the 1999 amendments to section 35.47 of the Texas Business and Commerce Code because Texas consumers had complained to the legislature that there was uncertainty about whether TCPA damage actions could be brought in Texas courts, rather than because it was considered necessary. *See Biggerstaff*, *supra*, at 409 n. 10.

by the research organization of the Texas House of Representatives, which was not involved in passage of the TCPA by the United States Congress. *See Sullivan v. Finkelstein*, 496 U.S. 617, 631, 110 S.Ct. 2658, 2667, 110 L.Ed.2d 563 (1990) (Scalia, J., concurring in part) (stating that "post-enactment legislative history" is an oxymoron and should not be considered in interpreting statutes and that even the proponents of its use limit it to statements from members of the same legislative body that enacted the statute). For these reasons, we do not find this Texas legislative history relevant or helpful in the interpretation of the TCPA. Similarly, the FCC memorandum opinion cited by the Recipients does not weigh strongly for or against the opt-in interpretation and does not constitute an interpretation by the FCC of the statutory language at issue in this case.

After scrutinizing the language of the TCPA and considering the object sought to be obtained, the circumstances of the TCPA's enactment, the legislative history, and the consequences of the different interpretations, we agree with the courts from the nine other states that have declined to adopt the opt-in interpretation. *See Lary*, 878 So.2d at ——, ——, 2003 WL 22463948, at *2-*5; *Condon*, 855 So.2d at 645-48; *Kaufman*, 2 Cal.Rptr.3d at 306-12; *Reynolds*, 79 S.W.3d at 908-10; *Zelma*, 778 A.2d at 593-98; *Worsham*, 772 A.2d at 871-74; *Aronson*, 51 Pa. D. & C. 4th at 423-36; *Hooters of Augusta, Inc.*, 537 S.E.2d at 470-71; *Schulman*, 710 N.Y.S.2d at 370-72.

Congress sought to penalize and discourage unsolicited fax advertisements because they are an unwelcome source of annoyance, disruption, and expense to consumers. *See Telemarketing Practices, supra*, at 54-57; H.R.Rep. No. 102-

317, 1st Sess., at 25 (1991). Congress intended to help states regulate and penalize unsolicited fax advertisements by overcoming the states' inability to regulate interstate faxes. *See* Sen. Rep. No. 102-178, 1st Sess., at 3 (1991), *reprinted in* 1991 U.S.C.C.A.N., at 1970. By definition, this meant that no state statute allowed claimants to assert a damage claim based on unsolicited interstate faxes when the TCPA took effect. If we were to adopt the opt-in interpretation, that would mean that no private damage actions for unsolicited interstate faxes could be asserted in any state unless and until that state enacted an enabling statute. There is no apparent reason why Congress would structure TCPA damage actions in such an inefficient and ineffective manner. *See Aronson*, 51 Pa. D. & C. 4th at 429 (stating that there would be no reason why Congress would have created a statutory scheme in which it looked exclusively to the state courts to enforce private damage actions and in which, at the same time, Congress prevented states from entertaining these actions until each state passed an enabling statute, even though state courts otherwise would have been able to hear these federal claims). We reject the opt-in interpretation.

4. "Opt-Out" Versus "Acknowledgment" Interpretations

The acknowledgment interpretation, which would construe the TCPA to provide an unconditional private damage claim under federal law that must be asserted in state court and cannot be declined, creates a troubling incongruity. As shown below, the acknowledgment interpretation is inconsistent with the text of the TCPA, because it would make language in the TCPA doubly redundant.

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The supporters of the acknowledgment interpretation argue that the "if otherwise permitted" clause simply acknowledges that states have the right to structure their own court systems and are not required to change their neutral procedural rules to accommodate TCPA damage claims. *See Schulman,* 710 N.Y.S.2d at 370-72; Biggerstaff, *supra,* at 416-46. As courts of general jurisdiction, it is presumed that Texas district courts have the power to adjudicate private damage claims under federal statutes, unless the Texas Legislature or the United States Congress provide that they do not.[8] *See* U.S. Const., art. VI, cl. 2; Tex. Const. art. V, § 8; Tex. Gov't Code § § 24.007, 24.008; *Dubai Petroleum Co. v. Kazi,* 12 S.W.3d 71, 75 (Tex.2000). These principles are well-established under this country's federal system of government and under *the Supremacy Clause of the United States Constitution. See Howlett v. Rose,* 496 U.S. 356, 367-71, 110 S.Ct. 2430, 2438-41, 110 L.Ed.2d 332 (1990); *Dubai Petroleum Co.,* 12 S.W.3d at 75. There is no requirement that anything be stated in the federal statute for these principles to apply; as long as Congress duly enacts a statute

8. Statutes duly enacted by the United States Congress are as much laws in Texas as statutes enacted by the Texas Legislature. See *Howlett v. Rose*, 496 U.S. 356, 367-69, 110 S.Ct. 2430, 2438-39, 110 L.Ed.2d 332 (1990). Texas law and federal law form one system of jurisprudence, which together constitutes the law of the land for Texas. *See Howlett*, 496 U.S. at 367-69, 110 S.Ct. at 2438-39. Under the Supremacy Clause of the United States Constitution, the United States Constitution and duly-enacted federal statutes are "the supreme Law of the Land," and Texas courts have a responsibility to enforce that law according to their ordinary procedural rules. See U.S. Const., art. VI, cl. 2; *Howlett*, 496 U.S. at 367-69, 110 S.Ct. at 2438-39.

that it has the power to enact under the United States Constitution, these principles are triggered and state courts of general jurisdiction must entertain these claims unless the federal statute says otherwise or unless neutral state procedural rules that are not preempted prevent the assertion of a claim. *See Howlett,* 496 U.S. at 367-71, 110 S.Ct. at 2438-41. Therefore, Congress had no need to state these principles in the TCPA.

Further, the procedural matters mentioned by proponents of the acknowledgment interpretation are generally procedural law or rules relating to matters such as subject-matter jurisdiction, amount in controversy, or venue-all of which simply allow the state, by its neutral procedural rules, to decide which state court will hear the federal claim. *See* Biggerstaff, *supra,* at 418. While Congress might have wanted to include a provision in the statute that would confirm this reality, that confirmation is already accomplished by other language in the TCPA-"[a] person or entity may, if otherwise permitted by the laws or rules of court of a State, bring *in an appropriate court of that State* ..." 47 U.S.C. § 227(b)(3) (emphasis added). This italicized language unmistakably recognizes the constitutional realities that would apply anyway. It would be redundant and risk rendering the words meaningless to interpret the "if otherwise provided" clause to have the same meaning. *See TRW Inc. v. Andrews,* 534 U.S. 19, 31, 122 S.Ct. 441, 449, 151 L.Ed.2d 339 (2001) (stating that courts should construe the language of federal statutes, if possible, so that no word is rendered meaningless or insignificant).

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Given the language of the TCPA, the statute's purposes, the provision allowing state attorneys general to obtain the same remedies for their citizens that are available in the private damage actions, and Congress's reasonable and legitimate concern that it not overburden state court systems with potentially large numbers of private claims, we agree with the majority view that the opt-out interpretation is the correct one. Enabling legislation is not required, but a state may prohibit private TCPA damage actions in its courts. *See International Science & Tech. Inst.*, 106 F.3d at 1156-58; (explaining purposes of TCPA and why opt-out interpretation makes sense from a policy perspective); *Lary*, 878 So.2d 1158, —— & n. 2, 2003 WL 22463948, at *2-*5 & n. 2 (adopting opt-out interpretation and disapproving of acknowledgment interpretation); *Condon*, 855 So.2d at 645-48 (adopting opt-out interpretation); *Kaufman*, 2 Cal.Rptr.3d at 312 (holding that states can opt out of TCPA damage actions and that California has not done so); *Reynolds*, 79 S.W.3d at 910 (adopting opt-out interpretation); *Worsham*, 772 A.2d at 874; *Aronson*, 51 Pa. D. & C. 4th at 430 (adopting opt-out interpretation); *Hooters of Augusta, Inc.*, 537 S.E.2d at 471 (adopting opt-out interpretation); *but see Schulman*, 710 N.Y.S.2d at 372 (adopting acknowledgment interpretation); *Autoflex Leasing*, 16 S.W.3d at 817 (adopting opt-in interpretation).

One commentator who strongly supports the acknowledgment interpretation claims that it is preferable because courts should not construe a statute to alter a delicate constitutional balance without an explicit directive from Congress that this was intended. Biggerstaff, *supra*, at 426-33. The argument is that the opt-out interpretation upsets

the fragile balance of this country's federal system of government and threatens to undermine the Supremacy Clause. *See id.* But the federal system of government in our country is strong, and the opt-out interpretation gives effect to what its proponents conclude is the statutory directive from Congress under the Supremacy Clause. Rather than undermining the authority of federal law, this interpretation recognizes it as the supreme law of the land. If Congress decides that it is not satisfied with the results of its opt-out system for private TCPA damage claims in state courts, our federal lawmakers are free to make these claims mandatory in all state courts by amending the TCPA and preempting state statutes to the contrary.[9] For these reasons, we respectfully decline to adopt the acknowledgment interpretation. Instead, we hold that the Recipients may assert TCPA damage claims as long as Texas has not prohibited them from doing so.

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9. The same commentator suggests that if there are any constitutional problems relating to the acknowledgment interpretation arguably effecting a federal commandeering of state resources, these problems can be avoided by holding that federal courts and state courts have concurrent jurisdiction over private TCPA damage claims. *See Biggerstaff*, *supra*, at 446. This option is not available to this court because the Fifth Circuit already has determined that no federal jurisdiction is available to the Recipients. *See Chair King, Inc.*, 131 F.3d at 514. In any event, finding federal jurisdiction in this regard would be contrary to the holding of every federal court of appeals that has addressed this issue and would not result in a correct ruling.

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5. Section 35.47 of the Texas Business and Commerce Code

Before the enactment of the TCPA, Texas enacted a statute regulating certain unsolicited fax advertisements without providing for any private damage claim. *See* Act of May 23, 1989, 71st Leg., R.S., ch. 783, § 1, 1989 Tex. Gen Laws 3469, 3469-70. The effect, if any, of this prior statute on the ability of the Recipients to assert TCPA damage claims is not before us. In their primary argument on appeal, the Advertisers contend the trial court correctly granted summary judgment based on the opt-in interpretation. In the course of this argument, the Advertisers expressly reject the opt-out interpretation of the TCPA. However, in an alternative appellate argument, they assert that, as to faxes sent before September 1, 1999, Texas has opted out of the TCPA based on the 1989 unsolicited fax statute. *See* 1989 Tex. Gen Laws at 3469-70.

Although the Advertisers asserted in the trial court that there is no implied damage action under this statute, they did not assert as a summary-judgment ground any opt-out theory or any theory under which the 1989 unsolicited fax statute precludes the Recipients from asserting their TCPA damage claims. Therefore, this court cannot affirm the trial court's summary judgment on any such grounds because the Advertisers did not assert them in the trial court. *See Stiles v. Resolution Trust Corp.*, 867 S.W.2d 24, 26 (Tex.1993) (holding appellate court cannot affirm trial court's summary judgment on a ground not expressly stated in motion for summary judgment). We are limited to reviewing the ground that the Advertisers did assert-that the Recipients' claims are

barred because Texas did not authorize the filing of TCPA damage claims in Texas courts until September 1, 1999.[10] Accordingly, we conclude that the trial court erred by granting summary judgment based on its implied ruling that the Recipients' TCPA damage claims are barred under the opt-in interpretation.

B. Are the Recipients' TCPA damage claims barred because the TCPA does not apply to intrastate faxes?

The Recipients also assert that the trial court erred by impliedly granting summary judgment based on the Advertisers' argument that the TCPA applies only to interstate facsimile advertisements. The Recipients argue that the TCPA applies to intrastate faxes based on its plain language. The Recipients are correct.

The TCPA regulates unsolicited telephone calls and fax communications. *See* 47 U.S.C. § 227. The TCPA amended the Communications Act of 1934. *See* 47 U.S.C. § 151 *et*

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10. Even if the Advertisers had asserted this ground in the trial court, there would be no merit in it, because the 1989 unsolicited fax statute does not constitute an opting out of private damage claims under the TCPA, which was enacted in 1991. *See Condon*, 855 So.2d at 648 (holding Florida did not "opt out" of TCPA by, prior to enactment of TCPA, passing statutes regulating unsolicited fax advertisements without allowing for private damage claims); *Hooters of Augusta, Inc.*, 537 S.E.2d at 471-72 (same for Georgia); but *see R.A. Ponte Architects, Ltd.*, 815 A.2d at 827 (holding Maryland opted out of TCPA by, prior to enactment of TCPA, passing statutes regulating unsolicited fax advertisements without allowing for private damage claims).

seq. Although the Communications Act contains an interstate only restriction, the TCPA itself contained a conforming amendment that expressly excepts the TCPA from the Communications Act's interstate-only restriction. *See* 47 U.S.C. § 152(b) (1994); *Texas v. Am. Blastfax, Inc.*, 121 F.Supp.2d 1085, 1088 (W.D.Tex.2000); *Omnibus Int'l, Inc. v. AT & T, Inc.*, 111 S.W.3d 818, 821-22 (Tex.App.-Dallas 2003, pet. granted, judgm't vacated w.r.m.); *Hooters of Augusta, Inc.*, 537 S.E.2d at 471-72 & n. 7. Under the TCPA, "[i]t shall be unlawful for any person within the United States ... to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine." 47 U.S.C. § 227(b)(1)(C). The statute defines the term "unsolicited advertisement" as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission." 47 U.S.C. § 227(a)(4).

Although the TCPA does not specifically state that it covers both interstate and intrastate faxes, section 227(b)(1)(C) applies to unsolicited faxes sent by any person in the United States, without limiting its scope to interstate faxes. *See* 47 U.S.C. § 227(b)(1)(C). Furthermore, in expressly excepting the TCPA from the interstate-only restriction of the Communications Act, the conforming amendment evinces a congressional intent that the TCPA apply to intrastate fax communications. *See Am. Blastfax, Inc.*, 121 F.Supp.2d at 1088; *Omnibus Int'l, Inc.*, 111 S.W.3d at 821-22; *Hooters of Augusta, Inc.*, 537 S.E.2d at 471 (holding Congress expressed its intent to regulate both interstate and intrastate communications by excepting the

TCPA from interstate limitation of 47 U.S.C. § 152). The statutory scheme of the TCPA is coherent and consistent, and the language relevant to this issue is unambiguous. *See Barnhart,* 534 U.S. at 450, 122 S.Ct. at 950. Therefore, we hold that the TCPA applies to both interstate and intrastate facsimile advertisements. *See Am. Blastfax, Inc.,* 121 F.Supp.2d at 1088; *Omnibus Int'l, Inc.,* 111 S.W.3d at 821-22; *Hooters of Augusta, Inc.,* 537 S.E.2d at 471. We find the trial court erred in granting summary judgment based on its implied ruling that the TCPA applies only to interstate faxes.

C. Does the TCPA fall outside Congress's power under the Commerce Clause?

The trial court also granted summary judgment based on its implied ruling that, if the TCPA applies to intrastate faxes, Congress lacks the power to enact the TCPA under the *Commerce Clause of the United States Constitution.*

First, Congress has authority to regulate intrastate faxes. This is because telephones and telephone lines-even when used solely for intrastate purposes-are part of an aggregate interstate system and therefore are inherent instrumentalities of interstate commerce. *See United States v. Weathers,* 169 F.3d 336, 341 (6th Cir.1999) ("It is well established that telephones, even when used intrastate, constitute instrumentalities of interstate commerce") (emphasis omitted); *Am. Blastfax, Inc.,* 121 F.Supp.2d at 1087. Thus, Congress may regulate purely intrastate telephone activity to protect interstate commerce. *See United States v. Gilbert,* 181 F.3d 152, 158 (1st Cir.1999) (discussing the "long standing" line of cases holding Congress may regulate purely

intrastate telephone activity under the Commerce Clause); *Pavlak v. Church*, 727 F.2d 1425, 1427 (9th Cir.1984) ("Federal jurisdiction over purely intrastate communications under the Federal Communications Act derives from Congress' plenary power to regulate interstate commerce through regulating the means of such commerce.... Since the telephone is an instrumentality of interstate commerce, Congress has plenary power under the Constitution to regulate its use and abuse") (citations and quotations omitted); *see also United States v. Lopez*, 514 U.S. 549, 558, 115 S.Ct. 1624, 1629, 131 L.Ed.2d 626 (1995) (stating "Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities"). Congress has the requisite power to regulate intrastate faxes and was not acting beyond its powers in enacting the TCPA. Indeed, to hold otherwise would undermine well-established federal law in other areas. *See, e.g., Alley v. Miramon*, 614 F.2d 1372, 1379 (5th Cir.1980) (stating "[t]his court has consistently held that the intrastate use of the telephone may confer jurisdiction over a private action under Section 10(b) and Rule 10b-5 [of the federal securities laws]"). Accordingly, we find the trial court erred in granting summary judgment based on its implied ruling that the TCPA falls outside the power granted to Congress in the *Commerce Clause of the United States Constitution*. *See Am. Blastfax, Inc.*, 121 F.Supp.2d at 1087-88 (holding Commerce Clause challenge to TCPA failed).

D. Does the TCPA's minimum damage provision violate due process under the United States and Texas Constitutions on the ground that it is grossly disproportionate to any damage suffered by the Recipients?

The trial court also granted summary judgment based on its implied ruling that the TCPA's minimum damage award of $500 per fax violates due process under the *Due Process Clause of the Fifth Amendment to the United States Constitution* and under the *Due Course of Law Clause of the Texas Constitution*. *See* U.S. Const. amend. V; Tex. Const. art. I, § 16. Given the *Supremacy Clause of the United States Constitution*, it is unusual to have a federal statute challenged on state constitutional grounds; however, the Advertisers assert that Congress voluntarily made the Texas Constitution applicable to the TCPA by means of the TCPA's "if otherwise permitted" language. *See* U.S. Const., art. VI, cl. 2. For the sake of argument, we presume the Advertisers are correct. When, as in this case, the Advertisers have not argued that differences in state and federal constitutional guarantees are material to the case, and none are apparent, we limit our analysis to the *Fifth Amendment Due Process Clause* and presume that its protections are congruent with those of the *Texas Constitution's Due Course of Law Clause*. *See Bentley v. Bunton*, 94 S.W.3d 561, 579 (Tex.2002).

The Advertisers contend that the $500 minimum amount of damages per TCPA violation that a claimant may recover in a private damage action violates constitutional due process because this minimum amount is "grossly disproportionate" to any actual harm suffered by the Recipients. *See* 47 U.S.C.

§ 227(b)(3). A statutory penalty violates due process "only where the penalty prescribed is so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable." *St. Louis, Iron Mt. & S. Ry. Co. v. Williams,* 251 U.S. 63, 67, 40 S.Ct. 71, 73, 64 L.Ed. 139 (1919).

The Advertisers assert that the actual cost of receiving an unsolicited fax is two to forty cents per fax, yet the minimum damage amount is $500 per fax. But the TCPA damage provision was not designed solely to compensate each private injury caused by unsolicited fax advertisements. It also was intended to address and deter the overall public harm caused by such conduct. *See Am. Blastfax, Inc.,* 121 F.Supp.2d at 1090. The TCPA damage amount was meant (1) to take into account the difficult-to-quantify business-interruption costs imposed upon recipients of unsolicited fax advertisements; (2) to deter the unscrupulous practice of shifting these costs to unwitting recipients of unsolicited fax advertisements; and (3) to give an adequate incentive for an individual claimant to bring suit on his own behalf. *See id.; Kenro, Inc. v. Fax Daily, Inc.,* 962 F.Supp. 1162, 1166 (S.D.Ind.1997).

The Supreme Court has stated that statutory damages designed to address such "public wrongs" need not be "confined or proportioned to [actual] loss or damages; for, as it is imposed as a punishment for the violation of a public law, the Legislature may adjust its amount to the public wrong rather than the private injury, just as if it were going to the state." *Williams,* 251 U.S. at 66-67, 40 S.Ct. at 73. In *Williams,* the Supreme Court found that the statute at issue, a fixed penalty for passenger overcharges, did not violate

due process. *See id.* In explaining its ruling, the Court stated: "[w]hen [the statute] is considered with due regard for the interests of the public, the numberless opportunities for committing the offense, and the need for securing uniform adherence to established passenger rates, we think it properly cannot be said to be so severe and oppressive as to be wholly disproportioned to the offense or obviously unreasonable." *Id.* The same is true here. *See Am. Blastfax, Inc.*, 121 F.Supp.2d at 1091.

Congress identified two legitimate public harms intended to be addressed by the TCPA's ban on unsolicited fax advertisements: (1) these fax advertisements can substantially interfere with a business or residence because fax machines generally can handle only one message at a time, to the exclusion of other messages; and (2) unsolicited fax advertisements unfairly shift nearly all of the advertiser's printing costs to the recipient of the advertisement. *See Kenro,* 962 F.Supp. at 1167. The TCPA's $500 minimum damages provision, when measured against the overall harms of unsolicited fax advertising and the public interest in deterring this unwelcome conduct, is not "so severe and oppressive as to be wholly disproportioned to the offense or obviously unreasonable." *See Am. Blastfax, Inc.*, 121 F.Supp.2d at 1091 (holding $500 minimum damage amount under TCPA does not violate due process); *Kenro,* 962 F.Supp. at 1166-67 (same); *ESI Ergonomic Solutions, LLC v. United Artists Theatre Circuit, Inc.*, 203 Ariz. 94, 50 P.3d 844, 850-52 (2002) (same); *Kaufman,* 2 Cal.Rptr.3d at 312 (same); *Harjoe v. Herz Fin.*, 108 S.W.3d 653, 654-55 (Mo.2003) (same). Accordingly, we find the trial court erred in granting summary judgment based on its implied ruling that the TCPA minimum damage amount violates constitutional due process.

E. Does the TCPA violate the Advertisers' free-speech rights under the United States and Texas Constitutions?

The trial court also granted summary judgment based on its implied ruling that the TCPA violated the Advertisers' free-speech rights under the United States and Texas Constitutions. Because the Advertisers have not shown how the text, history, or purpose of the Texas state constitutional provision affords them any greater protection than the First Amendment in the context of this case, even if the Texas Constitution applied to the TCPA, we still would apply the same analysis under the Texas Constitution and the First Amendment. *See Bentley*, 94 S.W.3d at 578.

The Advertisers contend the TCPA's ban on unsolicited fax advertisements is an impermissible regulation of commercial speech. *See* 47 U.S.C. § 227(a)(4) (defining "unsolicited advertisement" as "material advertising the commercial availability or quality" of goods and services). Because commercial speech occupies a "subordinate position in the scale of First Amendment values," a statute regulating commercial speech passes constitutional muster as long as it directly advances a substantial governmental interest in a manner that forms a "reasonable fit" with the interest. *See Board of Trustees of State Univ., N.Y. v. Fox*, 492 U.S. 469, 477-80, 109 S.Ct. 3028, 3033-35, 106 L.Ed.2d 388 (1989). The issue before this court is whether the TCPA's ban on unsolicited fax advertisements meets this standard.

A federal district court in Oregon was the first to address this issue. In *Destination Ventures, Ltd. v. F.C.C.*, 844 F.Supp. 632 (D.Or.1994), *aff'd* 46 F.3d 54 (9th Cir.1995), that court

found Congress's interest in preventing cost shifting " 'from the advertiser to the unwitting customer' " and in preventing fax machines from being tied up by unwanted messages was a substantial interest that is identified in the TCPA's legislative history. *See id.* at 637 (quoting TCPA House Report). We already have determined that these interests are sufficiently legitimate to justify the TCPA's $500 per-violation minimum damages provision. Furthermore, as the district court in *Destination Ventures* stated, "there were repeated, uncontradicted references made before Congress describing how facsimile advertising shifts economic burdens from the advertiser to the consumer ... Congress legitimately relied upon the testimony from authorities, as well as the contemporaneous state laws and media reports." *Id.* We find Congress's interests in passing the TCPA-preventing "unwitting customers" from bearing the brunt of advertising costs and preventing unwanted fax machine interference-are substantial and real. *See Am. Blastfax, Inc.*, 121 F.Supp.2d at 1091-92.

Inasmuch as Congress's interests in preventing the harms caused by unsolicited fax advertising are substantial and real, banning this advertising directly advances these interests. *See Destination Ventures*, 844 F.Supp. at 637 (stating that "[b]ecause Congress has addressed a substantial interest in protecting consumers from the economic harms inflicted through unsolicited advertisement faxes ... the subsequent banning of those unsolicited faxes directly advances that interest"). Thus, the only remaining inquiry is whether there is a "reasonable fit" between the TCPA's ban on unwanted fax advertisements and the interests directly advanced by the ban. *See Fox*, 492 U.S. at 480-81, 109 S.Ct. at 3034-35. The

district courts in *Destination Ventures, Kenro,* and *Am. Blastfax, Inc.* considered and rejected as alternatives allowing recipients of unsolicited fax advertisements to place themselves on a "do not fax" list as well as placing time, length, and/or frequency limits on unsolicited fax advertising. *See Am. Blastfax, Inc.,* 121 F.Supp.2d at 1092; *Kenro,* 962 F.Supp. at 1168-69; *Destination Ventures,* 844 F.Supp. at 638-39. We conclude there is a reasonable fit, no more extensive than necessary, between the TCPA's ban on unsolicited fax advertisements and the interests directly advanced by the ban. *See Missouri v. Am. Blast Fax, Inc.,* 323 F.3d 649, 652-59 (8th Cir.2003) (rejecting First Amendment challenge to TCPA ban on unsolicited fax advertisements); *Destination Ventures, Ltd. v. F.C.C.,* 46 F.3d 54, 56 (9th Cir.1995) (affirming district court holding that TCPA did not violate First Amendment); *Am. Blastfax, Inc.,* 121 F.Supp.2d at 1091-92; *Kaufman,* 2 Cal.Rptr.3d at 312-23; *Harjoe,* 108 S.W.3d at 654-55; *Kenro,* 962 F.Supp. at 1167-69 (holding the mere existence of "imaginable alternatives" to the TCPA does not show the statute is improperly tailored); *but see Rudgayzer & Gratt v. Enine, Inc.,* 193 Misc.2d 449, 749 N.Y.S.2d 855, 857-60 (Civ.Ct.2002) (adopting analysis of *Missouri ex. rel. Nixon v. Am. Blast Fax, Inc.,* 196 F.Supp.2d 920 (E.D.Mo.2002), *rev'd by Am. Blast Fax,* Inc., 323 F.3d at 652-59, and holding that TCPA violates First Amendment).

The Advertisers also argue the TCPA violates the First Amendment because it lacks a scienter requirement for the $500 minimum damages provision. Generally, only statutes imposing criminal liability for dissemination of unprotected speech must contain a scienter element. *See New York v. Ferber,* 458 U.S. 747, 765, 102 S.Ct. 3348, 3358, 73 L.Ed.2d

1113 (1982); *Smith v. California*, 361 U.S. 147, 150-55, 80 S.Ct. 215, 217-19, 4 L.Ed.2d 205 (1959). The TCPA imposes no criminal liability. The only case the Advertisers cite in support of their contention that non-criminal statutes regulating commercial speech must have a scienter requirement is an Eighth Circuit case, *Video Software Dealers Ass'n v. Webster*, 968 F.2d 684 (8th Cir.1992). In that case, however, the court characterized the statute at issue, which prohibited the sale or rental of violent videos to minors, as "quasi-criminal in nature." *Id.* at 690. The TCPA is not a quasi-criminal statute, and we decline to extend First Amendment jurisprudence by requiring all non-criminal commercial speech regulations to include a scienter requirement.[11] *See Am. Blastfax, Inc.*, 121 F.Supp.2d at 1092 & n. 10. Accordingly, we find the trial court erred in granting summary judgment based on its implied ruling that the TCPA violates the Advertisers' free-speech rights under the United States and Texas Constitutions.

F. Does the TCPA violate the Equal Protection Clause of the United States Constitution?

The trial court also granted summary judgment based on its implied ruling that the TCPA violates the *Equal Protection Clause of the United States Constitution* because the statute's ban on unsolicited fax advertisements unfairly

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11. The Advertisers assert that this scienter argument was a separate summary-judgment ground that the Recipients did not attack on appeal; however, we conclude that the Recipients sufficiently assigned error in this regard in the First Amendment section of their appellate brief.

discriminates between commercial advertisements and noncommercial solicitations. The Advertisers argued in the trial court that strict scrutiny should be applied in evaluating this challenge because a fundamental right-freedom of speech-is involved.[12]

We have rejected the Advertisers' First Amendment challenge to the TCPA's ban on unsolicited fax advertisements; therefore, strict scrutiny is not applicable to the Advertisers' equal-protection claim on the basis that a First Amendment right is involved. *See Dunagin v. City of Oxford,* 718 F.2d 738, 752 (5th Cir.1983) (stating that "[i]n this case we have held the Mississippi law entirely legal under the First Amendment, and parties cannot insist on strict scrutiny merely by asserting a First Amendment right that the court ultimately finds not to be violated"). No other fundamental right or suspect class is implicated by the Advertisers' equal-protection challenge. *See Am. Blastfax, Inc.,* 121 F.Supp.2d at 1093. We already have determined for First Amendment purposes that a "reasonable fit" exists between the TCPA's identified interests and the means used to protect these interests. This same analysis is sufficient to satisfy the equal-protection rationality review. *See Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico,* 478 U.S. 328, 344 n. 9, 106 S.Ct. 2968, 2978 n. 9, 92 L.Ed.2d 266 (1986) (stating "[i]f there is a sufficient 'fit' between the legislature's means and ends to satisfy the concerns of the *First Amendment*, the same 'fit' is surely adequate under the applicable 'rational basis' equal protection analysis").

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12. The Advertisers have not addressed their equal-protection challenge on appeal.

Further, because Congress has substantial and valid interests in protecting "unwitting customers" from unsolicited fax advertisements, the TCPA's distinction between commercial and noncommercial advertising is quite rational. *See Destination Ventures,* 844 F.Supp. at 639; *Am. Blastfax, Inc.,* 121 F.Supp.2d at 1093. Therefore, we find the trial court erred in granting summary judgment based on its implied ruling that the TCPA violates the *Equal Protection Clause of the United States Constitution.*

G. Did the Advertisers conclusively prove their entitlement to judgment as a matter of law on their statute-of-limitations defense?

In their individual motions for summary judgment, both GTE Mobilnet and Chick-Fil-A asserted the statute of limitations as a bar to the Recipients' TCPA claims. The main issue presented by this challenge is whether the federal, four-year statute of limitations or state statutes of limitations apply to private TCPA actions. This appears to be an issue of first impression under the TCPA.

The Advertisers and the Recipients agree that the Recipients' common-law claims are governed by the two-year statute of limitations under section 16.003(a) of the Texas Civil Practice and Remedies Code. *See* Tex. Civ. Prac. & Rem.Code § 16.003(a). However, the Recipients assert that the residual, federal limitations period applies to their private claims under the TCPA. *See* 28 U.S.C. § 1658(a).

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1. Chick-Fil-A

Chick-Fil-A asserts correctly that, as to the TCPA claims, this case involves a "reverse-*Erie* " situation, in which the substantive law is federal and the procedural law is that of Texas. *See, e.g., Exxon Corp. v. Choo,* 881 S.W.2d 301, 305-06 & n. 9 (Tex.1994) (discussing "reverse-*Erie* " situation involving a federal maritime claim in state court). Chick-Fil-A argues in part that, in this reverse-*Erie* situation, the Texas limitations period applies because statutes of limitations are procedural and Texas law supplies the procedure. To support its position, Chick-Fil-A cites to *Hill v. Perel,* 923 S.W.2d 636, 639 (Tex.App.-Houston [1st Dist.] 1995, no writ), a case holding that limitations is generally procedural in a case in a Texas court in which the substantive law of another state applies. As applied to the TCPA, Chick-Fil-A's argument lacks merit for two reasons.

First, if Congress has enacted a statute that requires a four-year limitations period for the federal claim asserted in this case, then that federal law would preempt any contrary state-law analysis. *See Anderson v. Diamond M-Odeco, Inc.,* 912 S.W.2d 371, 372-73 (Tex.App.-Houston [14th Dist.] 1995, writ dism'd by agr.) (holding three-year maritime-tort statute of limitations under 46 U.S.C. § 763a applies to maritime torts filed in state court).

Second, this argument fails to recognize a historical difference between limitations rules in two different contexts: (1) *Erie* and reverse-*Erie* situations, and (2) situations in which Texas courts apply the substantive law of a foreign jurisdiction, which does not include federal law. When Texas

courts apply foreign law from another state or country, the rule has been that the foreign jurisdiction supplies the substantive law, and Texas supplies the procedural law, and this procedural law has been held to include the statute of limitations, unless the statute that created the claim contains an express limitations period. *See Hill*, 923 S.W.2d at 639. However, in *Erie* and reverse-*Erie* situations, courts have determined that, rather than decide the potentially difficult issue of whether limitations is procedural or substantive, the rule should simply be that the limitations period comes from the same source as the substantive law. *See Guaranty Trust Co. of N.Y. v. York*, 326 U.S. 99, 108-11, 65 S.Ct. 1464, 1469-71, 89 L.Ed. 2079 (1945) (holding that, in *Erie* situation-diversity claim in federal court-regardless of whether statutes of limitations are procedural or substantive, state statutes of limitations apply to maintain uniformity of outcomes among similar claims, regardless of whether they are brought in state court or federal court); *Engel v. Davenport*, 271 U.S. 33, 39, 46 S.Ct. 410, 413, 70 L.Ed. 813 (1926) (holding that limitations period in federal statute that governed personal-injury claim applied to state-court claim under that statute rather than state limitations period). This difference in the law has been diminished somewhat by the Texas Legislature's fairly recent enactment of a statute adopting the foreign state or country's statute of limitations for personal-injury or death claims under foreign law in Texas courts, if the claimant is not a resident of Texas. *See* Act of May 27, 1997, 75th Leg., R.S., ch. 424, § 3, 1999 Tex. Gen Laws 1680, 1683 (codified at Tex Civ. Prac. & Rem Code § 71.031(a)(3)). In any event, even if we were to conclude that statutes of limitations are "procedural," that would not answer the question now before us. Instead, we must interpret and apply the federal statute the Recipients claim governs this case. That statute states:

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Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues.

28 U.S.C. § 1658(a).

The Recipients' TCPA claims arise under an act of Congress, the TCPA. Congress enacted the TCPA after it enacted section 1658(a). *See* 47 U.S.C.A. § 227; 28 U.S.C.A. 1658. Therefore, the four-year statute of limitations in section 1658(a) applies to the TCPA claims unless another law provides otherwise. *See* 28 U.S.C. § 1658(a).

Chick-Fil-A asserts that another law-47 U.S.C. § 227(b)(3)-does provide otherwise because that statute specifies that private damage claims may be brought in state court "if otherwise permitted by the laws or rules of court of a State." 47 U.S.C. § 227(b)(3). This is a difficult issue and one of apparent first impression in the United States. After careful study and examination, we agree with Chick-Fil-A's position. Under the opt-out interpretation of section 227(b)(3) that we now have adopted, parties may assert private TCPA claims in an appropriate state court if state law permits. Therefore, if Texas limitations law does not permit the Recipients to pursue their claims against Chick-Fil-A, then the Recipients' claims are not "otherwise permitted" by Texas law.

Though Congress could have enacted a TCPA private damage claim with a four-year federal limitations period, our federal lawmakers had the flexibility and discretion to enact

a statute that allows states to exercise control over these federal claims in the state-court system. In this way, if these claims are not a burden on the state's judicial system, then the state need not take any action. Conversely, if the TCPA claims start to become a burden on the state-court system, either due to unmanageable quantities or because of increased scarcity of resources in the state's judicial system, then the TCPA allows states to take responsive action either by closing their courts to these claims or by shortening the limitations period to reduce the number of claims its judicial system must handle. State attorneys general still would be able to obtain the same relief in federal court, and this might be a more efficient arrangement in the judgment of some states. Given the TCPA's language, the congressional purposes in enacting it, and the statute's legislative history, we cannot conclude that Congress intended to force the states to hear these private TCPA claims with a long four-year limitations period, when many states have a one-year or two-year limitations period for tort claims. *See International Science & Tech. Inst.*, 106 F.3d at 1157 (stating that "concerned over the potential impact of private actions on the administration of state courts, Congress included a provision to allow the states to prohibit private TCPA actions in their courts. We have no doubt that Congress has a legitimate interest in not overburdening state and federal courts [or] that Congress has a legitimate interest in respecting the states' judgments about when their courts are overburdened"). Therefore, we conclude that the residual four-year federal limitations statute does not apply to private TCPA claims.

Under Texas law, if the Texas Supreme Court has not held that a tort is governed by a statute of limitations other than section 16.003(a) of the Texas Civil Practice and

Remedies Code and if that tort is not expressly covered by a statute of limitations, then we presume the tort is a "trespass" that is covered by the two-year statute of limitations of section 16.003(a). *See* Tex. Civ. Prac. & Rem.Code § 16.003(a); *Williams v. Khalaf*, 802 S.W.2d 651, 654 (Tex.1990); *Almazan v. United Services Automobile Assoc.*, 840 S.W.2d 776, 779-80 (Tex.App.-San Antonio 1992, writ denied) (applying *Khalaf* presumption regarding section 16.003(a) to statutory tort based on wrongful dismissal for filing workers' compensation claim). The Recipients' private TCPA claims are tort claims. Further, because the Texas Supreme Court has not held that private TCPA claims are governed by a statute of limitations other than section 16.003(a) and because such claims are not expressly covered by a statute of limitations, we presume that private TCPA claims are covered by section 16.003(a). *See* Tex. Civ. Prac. & Rem.Code § 16.003(a); *Williams*, 802 S.W.2d at 654; *Almazan*, 840 S.W.2d at 779-80. This presumption has not been overcome. We conclude that the Recipients' private TCPA claims are covered by the language of section 16.003(a)'s two-year statute of limitations. *See* Tex. Civ. Prac. & Rem.Code § 16.003(a) (stating that two-year statute of limitations covers, among other things, "trespass for injury to the estate or to the property of another, conversion of personal property, taking or detaining the personal property of another, personal injury...."); *Almazan*, 840 S.W.2d at 779-80 (holding statutory tort based on wrongful dismissal for filing workers' compensation claim is governed by section 16.003(a)'s two-year statute of limitations rather than by the residual four-your statute of limitations); *Collins v. Collins*, 904 S.W.2d 792, 804 (Tex.App.-Houston [1st Dist.] 1995) (holding claim under Texas wiretap statute is governed by

section 16.003(a)' s two-year statute of limitations rather than by the residual four-your statute of limitations) (en banc), *writ denied*, 923 S.W.2d 569 (Tex.1996). Thus, we evaluate the timeliness of the Recipients' TCPA claims by calculating whether they were brought within two years of accrual.

The type of TCPA claim asserted by the Recipients accrues when the defendant sends an unsolicited advertisement to the plaintiff's fax machine. *See* 47 U.S.C. § 227(b)(1)(C), (b)(3). The parties do not dispute that the Recipients sued Chick-Fil-A for the first time on March 11, 1998. The Recipients have not cited, and this court has not found, any summary-judgment evidence raising a genuine issue of material fact as to whether the Recipients received any fax advertisement from Chick-Fil-A on or after March 11, 1996. The only evidence on this point shows that all of the fax advertisements Chick-Fil-A allegedly sent to the Recipients were sent before March 11, 1996, which is more than two years before the Recipients filed suit against Chick-Fil-A. Accordingly, we conclude that the trial court acted correctly in granting Chick-Fil-A's motion for summary judgment based on limitations, and we overrule the Recipients' issue on appeal to the extent that it challenges the take-nothing judgment in favor of Chick-Fil-A.

2. GTE Mobilnet

GTE Mobilnet also moved for summary judgment on the ground that the statute of limitations barred the Recipients' TCPA claims. However, the record shows that the Recipients' action against GTE Mobilnet (the Federal Suit) was dismissed for lack of jurisdiction on January 12,

1998, and that the Recipients brought suit against GTE Mobilnet in this case 58 days later, on March 11, 1998. Therefore, under Texas limitations law, the date of filing as to the claims against GTE Mobilnet relates back to April 12, 1995-the date the Recipients filed the Federal Suit against GTE Mobilnet. *See* Tex. Civ. Prac. & Rem.Code § 16.064. None of the fax advertisements in the record on which the Recipients base their claims against GTE Mobilnet were sent before April 12, 1993. Therefore, the trial court erred in granting summary judgment based on its implied ruling that the Recipients' claims against GTE Mobilnet were barred by limitations.

H. Did the trial court err by granting GTE Mobilnet summary judgment based on its assertion that independently owned and operated agents, rather than GTE Mobilnet, sent the faxes in question?

The trial court also granted summary judgment based on its implied ruling that GTE Mobilnet's independently owned and operated agents, rather than GTE Mobilnet, sent the GTE Mobilnet fax advertisements. In support of GTE Mobilnet's motion for summary judgment, Jeffrey L. Sicard testified by affidavit that he is a general manager for GTE Mobilnet and that the fax advertisements in question relating to GTE Mobilnet "were not sent by GTE Mobilnet of Houston, Inc., but were sent by independently owned and operated agents." Applying the familiar standards of review for summary judgment, this affidavit by itself raised a genuine issue of material fact as to whether GTE Mobilnet used any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to one or more of the Recipients.

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The TCPA does not require that GTE Mobilnet or its employees be the ones to actually send unsolicited fax advertisements for liability to attach. *See Hooters of Augusta, Inc.*, 537 S.E.2d at 472; *see also Worsham*, 772 A.2d 868, 877-79 (stating, in context of damage action under 47 U.S.C. § 227(c)(5), that under TCPA, defendant still can be liable, even if independent contractor made the call on defendant's behalf). Under the TCPA, "the entity or entities on whose behalf facsimiles are transmitted are ultimately liable for compliance with the [TCPA's] rule banning unsolicited facsimile advertisements." *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, FCC Release No. 95-310, 10 F.C.C. Rcd. 12391, 12407 (Aug. 7, 1995). Parties wishing to send unsolicited fax advertisements in violation of the TCPA should not be able to avoid liability simply by having the transmission executed by an independent contractor. *Hooters of Augusta, Inc.*, 537 S.E.2d at 472. A reasonable inference from Sicard's affidavit would be that GTE Mobilnet and its employees did not send the faxes in question but that one of GTE Mobilnet's independent agents sent these faxes. *See Dolcefino*, 19 S.W.3d at 916. Therefore, we conclude that there is a genuine issue of material fact as to whether the fax advertisements in question were sent by someone acting on behalf of GTE Mobilnet. *See Worsham*, 772 A.2d at 878-79 (finding fact issue under TCPA as to whether phone calls were made on behalf of defendant).[13] Accordingly, we

13. GTE Mobilnet also cites a second affidavit from Sicard that was filed in response to the Recipients' motion for partial summary judgment. Sicard's first affidavit already raises a fact issue, and that fact issue cannot be erased by Sicard filing a second affidavit. Further, it is not clear that the second Sicard affidavit speaks to GTE Mobilnet

(Cont'd)

conclude the trial court erred to the extent that it impliedly ruled that GTE Mobilnet was entitled to summary judgment based on its assertion that independently owned and operated agents, rather than GTE Mobilnet, sent the GTE Mobilnet fax advertisements.

I. Did the Recipients raise a genuine issue of material fact in response to GTE Mobilnet's assertion that there is no evidence GTE Mobilnet sent unsolicited fax advertisements to any of the Recipients?

GTE Mobilnet filed no-evidence motions for summary judgment directed to the claims of certain of the Recipients. We now consider the propriety of the trial court's implied rulings granting these motions.

1. The Chair King, Inc., Chair King, S.A., Inc., M.E. Ford and Associates, Vantage Shoe Warehouse, Inc., Counselor Systems, Inc., Pope and Booth, P.C., and Pope Escrow Company

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(Cont'd)
at all because it defines "GTE Mobilnet" in a way that seems to refer to GTE Mobilnet of South Texas Limited Partnership rather than to defendant/appellee GTE Mobilnet of Houston Inc. Although the second affidavit does state that the fax advertisements were not sent by "GTE Mobilnet" or on its behalf or at its request, this statement alone is conclusory and insufficient to support summary judgment in favor of GTE Mobilnet. *See Anderson v. Snider*, 808 S.W.2d 54, 55, 34 Tex. Sup. Ct. J. 516 (Tex.1991). Lastly, although the second affidavit states that the fax advertisements in question appear to have been sent by independent contractors, this is not sufficient to entitle GTE Mobilnet to summary judgment. *See Worsham*, 772 A.2d 868, 877-79; *Hooters of Augusta, Inc.*, 537 S.E.2d at 472.

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The following parties did not adduce any summary-judgment evidence showing that they received any fax advertisements from GTE Mobilnet: The Chair King, Inc., Chair King, S.A., Inc., M.E. Ford and Associates, Vantage Shoe Warehouse, Inc., Counselor Systems, Inc., Pope and Booth, P.C., and Pope Escrow Company. Based on these parties' failure to raise a genuine issue of material fact as to whether they received any unsolicited fax advertisement from GTE Mobilnet, we conclude that the trial court properly granted summary judgment as to all of these parties' claims against GTE Mobilnet.

2. Jerome Kosoy, M.D., Beautique, Inc., Discovery Services of Texas, Inc., hand Jeffrey K. Musker, D.C.

As to Jerome Kosoy, M.D., Beautique, Inc., Discovery Services of Texas, Inc., and Jeffrey K. Musker, D.C., we conclude that these four parties raised genuine issues of material fact as to whether GTE Mobilnet sent them unsolicited fax advertisements. In their affidavits, these parties asserted that the fax advertisements appended as attachments (which include advertisements for GTE Mobilnet) were sent to them by the defendants, a group that includes GTE Mobilnet. This evidence and the first affidavit of Jeffrey Sicard (discussed in section H., above) raise a genuine issue of material fact as to the elements of these parties' private TCPA claims. Therefore, the trial court erred to the extent it granted summary judgment as to the TCPA claims of Jerome Kosoy, M.D., Beautique, Inc., Discovery Services of Texas, Inc., and Jeffrey K. Musker, D.C.

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3. Jerome Kosoy, M.D.

As an additional ground for summary judgment as to Jerome Kosoy, M.D.'s claims, GTE Mobilnet asserted that it presumptively had permission to send him fax advertisements because it was not disputed that, at all relevant times, Kosoy was a customer of GTE Mobilnet. The TCPA prohibits sending fax advertisements to a person without that person's "prior express invitation or permission." *See* 47 U.S.C. § § 227(a)(4) and (b)(1)(C). The FCC has stated that "facsimile transmission [sic] from persons or entities who have an established business relationship with the recipient can be deemed to be invited or permitted by the recipient." *See* 7 F.C.C.R. 8752, n. 87, 1992 WL 690928 (1992). This notion of deeming permission is based on an inference and, as such, seems to conflict with the TCPA's requirement that the invitation or permission be express. *See* 47 U.S.C. § 227(a)(4). Characterizing permission granted by implication as "express" runs afoul of the plain meaning of the word. Generally, "express" means "clearly and unmistakably communicated; directly stated." Black's Law Dictionary 601 (7th ed.1999); *see also Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 192-93, 200, 205-06 (Tex.2001) (equating "express" with "states with unmistakable clarity" and with "clearly and unequivocally states"). Kosoy testified that he did not give prior express invitation or permission to the defendants (which includes GTE Mobilnet) to send the fax advertisements attached to his affidavit. Kosoy testified he did not want to receive these unsolicited fax advertisements and that he did not give prior express invitation or permission to GTE Mobilnet to send them. Under the applicable standard of review, we find that Kosoy raised a genuine issue of material fact as to whether he gave prior express invitation or permission.

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J. Did the Recipients raise a genuine issue of material fact in response to GTE Mobilnet's assertion that there is no evidence to support their common-law claims against GTE Mobilnet?

In addition to granting summary judgment on the Recipients' TCPA claims, the trial court also granted summary judgment in favor of GTE Mobilnet on the Recipients' common-law claims. We now consider the Recipients' challenges to these rulings.

1. Invasion of Privacy

As to the intrusion-upon-seclusion invasion-of-privacy claims, we conclude that the trial court properly granted summary judgment as to the claims of Jerome Kosoy, M.D., Beautique, Inc., Discovery Services of Texas, Inc., and Jeffrey K. Musker, D.C. against GTE Mobilnet. Certainly, sending unauthorized fax advertising may constitute invasion of privacy in some circumstances. *See International Science & Tech. Inst.,* 106 F.3d at 1150 (discussing legislative history of TCPA that states TCPA seeks to protect the privacy interests of residential telephone subscribers by restricting unsolicited phone and fax calls). However, as to Beautique, Inc. and Discovery Services of Texas, Inc., there is no Texas authority recognizing a corporation's right to solitude, seclusion, or privacy, and we decline to recognize one here. *See Express One Int'l, Inc. v. Steinbeck,* 53 S.W.3d 895, 900 (Tex. App.-Dallas 2001, no pet.) (stating no Texas authority recognizes a corporation's right to privacy).

Further, the two elements of this claim are: (1) an intentional intrusion, physically or otherwise, upon another's solitude, seclusion, or private affairs or concerns, (2) that would be highly offensive to a reasonable person. *Valenzuela v. Aquino,* 853 S.W.2d 512, 513 (Tex.1993). The summary-judgment evidence does not raise a genuine issue of material fact on either element for the claims of the individual claimants Jerome Kosoy, M.D. and Jeffrey K. Musker, D.C. According to Kosoy's affidavit, the address at which his fax machine is located contains a suite number, indicating an office address. In any event, neither claimant describes the circumstances surrounding his receipt of the fax advertisements in question. Neither describes the location of the fax machine or the expectation of solitude, seclusion, or privacy that he claims relating to this fax machine. Both failed to provide details regarding the facts that might bear on the offensiveness of GTE Mobilnet's alleged conduct.

On this record, we conclude the trial court correctly granted summary judgment against these four claimants regarding their invasion-of-privacy claims. *See Express One Int'l, Inc.,* 53 S.W.3d at 900-01 (affirming summary judgment where claimant did not adduce evidence raising fact issue as to invasion-of-privacy claim).

2. Trespass to Chattels

As to the trespass-to-chattels claim, for liability to attach, the wrongful interference with the chattel must have caused actual damage to the property or deprived the owner of its use for a substantial period. *See Zapata v. Ford Motor Credit Co.,* 615 S.W.2d 198, 201 (Tex.1981); *Omnibus Int'l,*

Inc., 111 S.W.3d at 826. Applying the familiar standard of review, we conclude Jerome Kosoy, M.D., Beautique, Inc., Discovery Services of Texas, Inc., and Jeffrey K. Musker, D.C. did not raise a genuine issue of material fact in this regard. Accordingly, the trial court correctly granted summary judgment as to the trespass-to-chattels claim. *See Omnibus Int'l, Inc.*, 111 S.W.3d at 826.

3. Negligence, Negligence Per Se, and Gross Negligence

As to the negligence and negligence per se claims, Jerome Kosoy, M.D., Beautique, Inc., Discovery Services of Texas, Inc., and Jeffrey K. Musker, D.C. have not adduced any evidence giving rise to a common-law negligence duty regarding the alleged actionable conduct. Furthermore, under the negligence per se analysis established by the Texas Supreme Court, this case does not involve a claim deriving the duty from the common law, and so, we conclude that this is not an appropriate case for negligence per se. *See Perry v. S.N.*, 973 S.W.2d 301, 306-07 (Tex.1998). As to the gross negligence allegation, applying the familiar standard of review, we find no evidence that GTE Mobilnet engaged in grossly negligent conduct. Accordingly, the trial court correctly granted summary judgment as to these claims.

4. Civil Conspiracy

A civil conspiracy is a combination by two or more persons to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means. *Firestone Steel Products Co. v. Barajas*, 927 S.W.2d 608, 614 (Tex.1996). The "gist

of a civil conspiracy" is the injury the conspirators intend to cause. *Id.* Civil conspiracy requires specific intent. *Id.* For a civil conspiracy to arise, the parties must be aware of the harm or the wrongful conduct at the beginning of the combination or agreement. *Id.* Reviewing the record under the applicable standard of review, we find no evidence that Adverfax and GTE Mobilnet had a meeting of the minds and knew that damage would result from sending unsolicited fax advertisements to any of the Recipients. Accordingly, we find the trial court correctly granted summary judgment on this issue.

In sum, we conclude that the trial court correctly granted summary judgment against Jerome Kosoy, M.D., Beautique, Inc., Discovery Services of Texas, Inc., and Jeffrey K. Musker, D.C. as to all of their common-law claims.

K. Can the Recipients appeal from the trial court's denial of the motion for partial summary judgment?

The Recipients' motion for partial summary judgment did not seek a final judgment. Therefore, we lack appellate jurisdiction to review the trial court's denial of this motion. *See CU Lloyd's of Texas v. Feldman,* 977 S.W.2d 568, 569 (Tex.1998) (stating that, before a court of appeals may review an order denying a cross motion for summary judgment not covered by an interlocutory appeal statute, both parties must have sought final judgment in their cross motions for summary judgment, unless an exception applies that involves declaratory relief). Because we may not address an issue not properly before this court, we do not consider the trial court's denial of the Recipients' motion for partial judgment in this appeal.

IV. CONCLUSION

The opt-out interpretation of the "if otherwise permitted" phrase is most consistent with the language, articulated goals, and legislative history of the TCPA. Therefore, the trial court erred by impliedly granting summary judgment based on the opt-in interpretation. Under this same phrase, the residual four-year federal statute of limitations does not apply when private actions are being asserted in Texas courts; rather, Texas limitations law applies. Under this law, the trial court correctly granted Chick-Fil-A summary judgment because the summary-judgment evidence proved as a matter of law that Chick-Fil-A did not send any allegedly unsolicited fax advertisement to any of the Recipients within the two-year period before the Recipients sued Chick-Fil-A in this case. However, the trial court erred in granting summary judgment in favor of GTE Mobilnet based on limitations. The trial court also erred by impliedly finding the TCPA applies only to interstate fax advertisements and by impliedly granting summary judgment based on the Advertisers' constitutional arguments. There is a genuine issue of material fact as to whether GTE Mobilnet sent unsolicited fax advertisements to appellants Jerome Kosoy, M.D., Beautique, Inc., Discovery Services of Texas, Inc., and Jeffrey K. Musker, D.C. The trial court properly granted summary judgment regarding the Recipients' common-law claims. This court has no jurisdiction to review the trial court's denial of the Recipients' motion for partial summary judgment.

Because the trial court correctly granted summary judgment as to the Recipients' common-law claims, all of their claims against appellee Chick-Fil-A, Inc., and the claims

of The Chair King, Inc., Chair King, S.A., Inc., M.E. Ford and Associates, Vantage Shoe Warehouse, Inc., Counselor Systems, Inc., Pope and Booth, P.C., and Pope Escrow Company under the TCPA, we affirm these rulings. However, we reverse the trial court's judgment as to the TCPA claims of appellants Jerome Kosoy, M.D., Beautique, Inc., Discovery Services of Texas, Inc., and Jeffrey K. Musker, D.C. against appellee GTE Mobilnet, and we remand these claims for further proceedings consistent with this opinion. We order the Recipients to pay any costs of appeal that have been incurred by Chick-Fil-A. Based on our holdings, we find good cause to apportion the costs of appeal incurred by the Recipients and GTE Mobilnet equally between the Recipients and GTE Mobilnet. *See* Tex.R.App. P. 43.4. Therefore, for good cause and in the interest of justice, we order the Recipients and GTE Mobilnet each to pay one-half of the aggregate appellate costs incurred by these parties in this case.

Kem Thompson frost

Justice

APPENDIX C — EXCERPTS OF FINAL JUDGMENT AND ORDER IN THE DISTRICT COURT OF HARRIS COUNTY TEXAS 152ND JUDICIAL DISTRICT DATED MARCH 2, 2000

NO. 95-036004

THE CHAIR KING, INC., ET AL.

v.

CHEVROLET COUNTRY, INC, D/B/A CHEVY COUNTRY, ET AL.

Final Judgment and Order on Defendants' and Plaintiffs' Motions for Summary Judgment

The Court has considered the individual motions for summary judgment filed by Defendants in the above-captioned and numbered cause. After considering the pleadings, the motions, Plaintiffs' Consolidated Response to Defendants' Individual Motions for Summary Judgment, Defendants' replies, certain individual defendants' Supplemental Motions for Summary Judgment, all other briefing relating to the motions, the competent summary judgment evidence, and argument of counsel, the Court is of the opinion that these Defendants' motions should be in all things GRANTED.

The Court has also considered Plaintiffs' Motion for Partial Summary Judgment Under the Telephone Consumer Protection Act (filed July 26, 1999) and Plaintiffs' Supplemental Motion for Partial Summary Judgment Under the Telephone Consumer Protection Act (filed September 24,

1999), all of Defendants' responses (including any objections to Plaintiffs' summary judgment proof), Plaintiffs' replies, all other briefing relating to the motions, the pleadings, the summary judgment evidence, and argument of counsel. The Court is of the opinion that the Plaintiffs' motions should be DENIED.

Furthermore, the Court has reconsidered the Defendants' Joint Motion for Summary Judgment (filed June 29, 1998), the Supplement to Defendants' Joint Motion for Summary Judgment (filed February 26, 1999), Defendants Hartford Fire Insurance Company's, Federal Kemper Life Assurance Company's and Texas Insurance Brokers' Motion for Summary Judgment (filed June 29, 1998), and Defendants Hartford Fire Insurance Company's and Federal Kemper Life Assurance Company's Motion for Reconsideration of Order Denying the Insurance Defendants' Motion for Summary Judgment (filed May 5, 1999). Having reconsidered the foregoing motions, Plaintiffs' responses, Defendants' replies, all other briefing relating to the motions, the pleadings, the competent summary judgment evidence, and argument of counsel, the Court is now of the opinion that these motions should be GRANTED. It is, therefore,

ORDERED, ADJUDGED, and DECREED that the following Defendants' individual Motions for Summary Judgment are GRANTED:

* * *

7. **Chick-Fil-A**: Chick-Fil-A's Motion for Summary Judgment;

* * *

19. **GTE Mobilnet**: GTE Mobilnet of Houston, Inc.'s Motion for Summary Judgment and GTE Mobilnet of Houston, Inc.'s Supplemental Motion for Summary Judgment;

* * *

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that Plaintiffs' Motion for Partial Summary Judgment Under the Telephone Consumer Protection Act and Plaintiffs' Supplemental Motion for Partial Summary Judgment Under the Telephone Consumer Protection Act are hereby DENIED; that Defendants' Joint Motion for Summary Judgment filed on June 29, 1998 and Supplement to Defendants' Joint Motion for Summary Judgment (filed February 26, 1999) are GRANTED; that Defendants Hartford Fire Insurance Company's, Federal Kemper Life Assurance Company's, and Texas Insurance Broker's Motion for Summary Judgment is GRANTED; that all objections to the summary judgment evidence lodged by Plaintiffs or by any Defendant or Defendants are OVERRULED; and that any and all prior orders of this Court that are inconsistent with this Order, including but not limited to the Order signed March 31, 1999 denying the Insurance Defendants' Motion for Summary Judgment and the Order signed April 12, 1999 denying Defendants' Joint Motion for Summary Judgment, are hereby VACATED and are null and void.

Appendix C

All expenses, court costs and attorney's fees are to be born by the party incurring the same. Consequently, all requests for expenses, court costs, and attorney's fees by any party in a motion encompassed by this Order and Final Judgment are hereby expressly DENIED.

All requests for sanctions or attorney's fees by any party in a motion encompassed by this Final Judgment and Order is hereby expressly DENIED.

All relief not expressly granted in this Final Judgment and Order is DENIED.

Signed this _____ day of March 7, 2000.

_____

Honorable Harvey Brown
Judge Presiding

FILED
MAY 25 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-1409

IN THE

Supreme Court of the United States

JEROME KOSOY, M.D., *et al.*,

Petitioners,

v.

GTE MOBILNET and CHICK-FIL-A, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS SUPREME COURT

BRIEF IN OPPOSITION OF CHICK-FIL-A, INC. AND GTE MOBILNET OF HOUSTON, INC.

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COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Whether the Texas Supreme Court correctly read 47 U.S.C. § 227(b)(3)—which specifies just one of the means of enforcing the prohibitions under the Telephone Consumer Protection Act ("TCPA")—as enabling States to decide whether to permit private rights of action to be brought in their courts for the vast number of alleged unsolicited faxes received by Americans every year.

2. Whether, in interpreting the TCPA and harmonizing it with 28 U.S.C. § 1658, the Texas Court of Appeals correctly concluded that private TCPA claims, which Congress intended be brought in state court, are subject to state statutes of limitations.

PARTIES TO THE PROCEEDING

Petitioners Jerome Kosoy, M.D., Beautique, Inc., Discovery Services of Texas, Inc., and Jeffrey K. Musker, D.C. (collectively "Petitioners"), self-defined as the "Chair King," Pet. 5 n.2, were petitioners and respondents in cross-petitions below. Respondents GTE Mobilnet of Houston, Inc. ("GTE") and Chick-Fil-A, Inc. ("Chick-Fil-A") (collectively "Respondents") were also petitioners and respondents below. Pet. 4a.

RULE 29.6 DISCLOSURE

1. Pursuant to Supreme Court Rule 29.6, Respondent Chick-Fil-A states that it has no parent companies and no publicly held corporation owns 10% or more of the stock of Chick-Fil-A, Inc.

2. Petitioners improperly named "GTE Mobilnet of Houston, Inc." below. They presumably intended to name GTE Wireless of Houston, LLC, which merged into San Antonio MTA, L.P. in 2002. San Antonio MTA, L.P. is a partnership of Verizon Wireless Texas, LLC, Verizon Wireless Personal Communications LP, and TU AcquisitionCo LLC. Verizon Wireless Texas, LLC is wholly owned by Verizon Wireless Personal Communications LP. Verizon Wireless Personal Communications LP is a partnership of TU AcquisitionCo LLC and Verizon Wireless South Area LLC, both of which are wholly owned by Cellco Partnership.

Cellco Partnership d/b/a Verizon Wireless ("Cellco") is a Delaware general partnership with debt in the hands of the public. Cellco has seven partners in total. Five of the partners, representing 55% of the interest in Cellco, are ultimately owned by Verizon Communications Inc. ("Verizon"), which is a publicly held company. These partners are: Bell Atlantic Cellular Holdings, L.P.; NYNEX PCS Inc.; PCSCO Partnership; GTE Wireless Incorporated; and GTE Wireless of Ohio Incorporated (collectively, the "Verizon Partners"). None of the Verizon Partners is publicly held. Two of the partners, representing 45% of the interest in Cellco, are ultimately owned by Vodafone Group Plc ("Vodafone"), which is a publicly held company. These partners are: PCS Nucleus, L.P. and JV PartnerCo, LLC (collectively, the "Vodafone Partners"). None of the Vodafone partners is publicly held.

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STATUTORY PROVISIONS INVOLVED

The full text of 47 U.S.C. § 227, which includes mechanisms for enforcement in addition to the provision empowering States to permit a private right of action to be brought in their courts, is attached hereto at Appendix A. The text of 28 U.S.C. § 1658 is attached hereto at Appendix B.

SUMMARY OF REASONS FOR DENYING THE PETITION

This case arises out of an action brought in Texas state court before September 1, 1999, alleging that Respondents, among others, were responsible for transmitting unsolicited fax advertisements to Petitioners in violation of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227. The sole vehicle for private enforcement under the TCPA is found in § 227(b)(3), which authorizes private parties to bring suit in "an appropriate court of [a] State" only "if otherwise permitted by the laws or rules of court of [that] State." *Id.* The Texas Supreme Court held that, because Texas did not "otherwise permit" or consent to such private rights of action being brought in its state courts before September 1, 1999, Petitioners failed to state a claim under the TCPA.

In their petition, Petitioners identify three questions that they would like for this Court to reconsider. In the first question presented, Petitioners argue that this Court should reconsider the issue of what action, if any, a state must take to permit private TCPA claims to be brought in its courts. In the second, they frame a question regarding whether Congress may constitutionally delegate to the States the decision whether to permit private TCPA claims to be brought in their courts. Finally, in the third question presented, Petitioners argue that the Texas intermediate court improperly applied Texas's two-year statute of limitations to the claims at issue. None of these issues is worthy of this Court's review.

First, the class of persons affected by the Texas Supreme Court's decision is, with the exception of Petitioners in this case, a null set. This is because there is no dispute that, since September 1, 1999, parties have been authorized by the Texas Legislature to bring private TCPA claims in Texas courts. Indeed, Petitioners themselves conceded before the Texas Supreme Court that the first question presented is "no longer important to cases filed in the last five years" in Texas. *See* Chair King Response to GTE's Brief on the Merits 22, *GTE Mobilnet of Houston, Inc. v. Kosoy*, No. 04-0570 (Tex. filed Jan. 17, 2005) ("Chair King Br.").

Second, even as to parties outside the State of Texas, Petitioners point to no state where parties are prohibited from bringing private TCPA claims in that state's courts. Simply stated, Petitioners have identified no purported unsolicited fax recipients, other than themselves in this case, who have been negatively affected by the Texas Supreme Court's decision in this case. The petition should be denied on this ground alone.

Third, Petitioners greatly overstate the nature of the split of authority on the first question presented. At most, there is a 4-1 split of authority among state courts of last resort (and federal appellate courts) on the issue, with the Texas Supreme Court's decision standing alone and without consequence, as explained above.

Fourth, although Petitioners include in their petition a second and related question regarding Congress's authority to delegate to the States the decision whether to permit private TCPA claims to be brought in their courts, Pet. *i*, they do not provide any explanation in their petition for why this Court should consider the question in this case. In fact, they fail to discuss the issue anywhere at all in the entirety of the petition, just as they failed to present this issue to the court below.

Fifth, the third question presented, regarding the appropriate statute of limitations, is equally unworthy of this Court's review. The Texas Supreme Court never passed upon the issue below and, contrary to Petitioners' suggestion, there is no split of authority among the state courts of last resort—or among any courts, for that matter—on this issue.

Sixth, there are alternative grounds for affirmance of the Texas Supreme Court's decision. Not only is there the statute of limitations issue, upon which the State's highest court has not yet passed, but there is a separate issue of whether Respondents can be held liable for the faxes at issue, which were transmitted by independent advertising companies on behalf of independent retailers. Accordingly, even if this Court were to reconsider each question presented, there is a strong possibility that this Court's decision would have no ultimate effect on the adjudication of rights between the parties in this case.

Finally, this Court should deny the petition because there is no error to correct. The Texas Supreme Court correctly interpreted the "if otherwise permitted" language of 47 U.S.C. § 227(b)(3) to require states to take some affirmative action to authorize parties to bring private TCPA claims in their courts, as did the Texas Legislature in 1999. Likewise, the Texas appellate court correctly interpreted the same TCPA section, in harmony with the federal residual statute of limitations section, 28 U.S.C. § 1658, to incorporate state statutes of limitations. For all of these reasons, the petition should be denied.

STATEMENT OF THE CASE

A. The Telephone Consumer Protection Act

Before Congress enacted the TCPA in 1991, more than 40 States had some form of legislation in place that prohibited certain *intrastate* unsolicited telemarketing calls or unsolicited advertising via facsimile transmissions. S. Rep. No. 102-178,

at 3 (1991), *as reprinted in* 1999 U.S.C.C.A.N. 1968. The States had no authority, however, to prohibit or regulate similar conduct as to *interstate* calls and faxes.[1] *See, e.g.*, TCPA of 1991, Pub. L. No. 102-243, §2(7), 105 Stat. 2394 (Congress expressly finding that in the absence of federal regulation, state regulations of such conduct could be "evade[d] . . . through interstate operations"); S. Rep. No. 102-178, at 5 ("Federal action [wa]s necessary because States do not have jurisdiction to protect their citizens against those who use these machines to place interstate calls."). Accordingly, the States' ability to stem the tide of such unsolicited calls and faxes was quite limited.

To bridge this gap, Congress enacted the TCPA as "comprehensive telemarketing legislation" designed to reach unsolicited telemarketing calls and fax advertisements without regard to jurisdictional boundaries. 137 Cong. Rec. S18,317 (daily ed. Nov. 26, 1991) (statement of Sen. Pressler). The TCPA, thus, includes a series of nationally "uniform" prohibitions, *id.*, that proscribe certain unsolicited advertising contacts by means of interstate and intrastate communications alike. *See* 47 U.S.C. § 227(b)(1). As to unsolicited fax advertisements—the conduct allegedly at issue in this case—§ 227 specifically prohibits the "use [of] any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement," with certain exceptions. *Id.* § 227(b)(1)(C).

This prohibition, then, is given effect through several mechanisms prescribed by Congress. *First*, the Federal Communications Commission ("FCC") is authorized under the

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1. As Senator Hollings, the sponsor of the Senate bill behind the TCPA explained, "[p]ursuant to the general preemptive effect of the Communications Act of 1934, State regulation of interstate communications, including interstate communications initiated for telemarketing purposes, is preempted." 137 Cong. Rec. S18,784 (daily ed. Nov. 27, 1991).

TCPA to "prescribe regulations to implement the" statute's various prohibitions. *Id.* § 227(b)(2). As to the unsolicited fax prohibition, the TCPA permits the FCC to, for example, exempt certain types of "professional or trade associations" from some of the requirements. *Id.* § 227(b)(2)(F); *see also id.* § 227(d)(2) (requiring the FCC to revise regulations "setting [certain] technical and procedural standards for telephone facsimile machines" regarding the markings that identify the sender of the fax).

Second, the TCPA authorizes "the attorney general of a State, or an official or agency designated by a State . . . [to] bring a civil action on behalf of its residents," in federal court, to enforce the restrictions enumerated in the TCPA and accompanying regulations. *Id.* § 227(f)(1)-(2). Although the FCC is given the "right . . . to intervene in the action," "to be heard on all matters arising therein," and "to file petitions for appeal" in such cases, *id.* § 227(f)(3), it is left to the discretion of each State's agents to decide whether it will institute such enforcement actions in federal court, *id.* § 227(f)(1) ("[T]he State *may* bring a civil action." (emphasis added)).

Finally, the TCPA creates a private enforcement mechanism, which provides: "A person or entity may, *if otherwise permitted by the laws or rules of court of a State*, bring in an appropriate court of that State" a "[p]rivate right of action" to enforce the prohibitions enumerated in the Act and the regulations promulgated pursuant thereto. *Id.* § 227(b)(3) (emphasis added). It is this provision, and specifically the meaning of the italicized clause regarding when a private actor may bring such a private right of action, that is at issue in this case.

B. Texas's Legislative Response to the TCPA

At the time Congress enacted the TCPA, Texas was one of the States that had taken affirmative steps to prohibit certain

unsolicited fax advertisements. In 1989, it had enacted a statute making it a Class C misdemeanor to advertise via unsolicited fax transmissions. *See* Act of May 23, 1989, 71st Leg., R.S., ch. 783, § 1, 1989 Tex. Gen. Laws 3469, 3469 ("1989 Act") (current version at Tex. Bus. & Com. Code § 35.47(e) (Vernon 2002)). Texas had declined, however, to enact a civil corollary to this criminal statute or authorize private rights of action to enforce this statute.

It was not until 1999, eight years after Congress enacted the TCPA, that Texas amended the 1989 Act to authorize private parties to bring a private right of action in state court to enforce the restrictions enumerated in the Act. *See* Act of May 26, 1999, 76th Leg., R.S., ch. 635, § 1, 1999 Tex. Gen. Laws 3203, 3203 ("1999 Act") (codified as amended at Tex. Bus. & Com. Code § 35.47(f) (Vernon 2002)). In the same provision, Texas expressly authorized persons in Texas to bring a private right of action in state court to enforce the TCPA. That is, under the newly amended Texas law, "[a] person who receives a communication that violates 47 U.S.C. Section 227, a regulation adopted under that provision, or this section [of Texas law] may bring an action against the person who originates the communication in a court of this state." Tex. Bus. & Com. Code § 35.47(f). No one in this case disputes that Texas, by enacting this provision, made clear its intention to permit private rights of action, as contemplated by 47 U.S.C. § 227(b)(3), to be brought in Texas state courts after September 1, 1999. *See* 1999 Act, § 3 ("This Act takes effect September 1, 1999").

C. The Unique History of this Case

This case arises out of Petitioners' claims regarding faxes that were allegedly sent in violation of the TCPA as far back as 1993. Three separate courts have now dismissed these claims on the merits.

1. The Claims in this Case as to GTE Were Originally Raised in Federal Court More than a Decade Ago.

In 1995, Petitioners filed suit against GTE and others in the United States District Court for the Southern District of Texas regarding faxes allegedly authorized to be sent by the defendants in violation of the TCPA. Pet. 30a. The district court dismissed all of Petitioners' TCPA claims on the merits. *See Chair King, Inc. v. Houston Cellular Corp.*, 131 F.3d 507, 509 (5th Cir. 1997) (explaining procedural posture).

On appeal, the U.S. Court of Appeals for the Fifth Circuit dismissed the case for lack of jurisdiction. *See id.* at 514. Although the court of appeals had no cause to determine whether Petitioners' claims could be brought in Texas state courts in particular, it did conclude that the federal courts lacked jurisdiction to hear such claims. *See id.* & n.1 (quoting the FCC as "indicat[ing] a consumer could 'file suit in state court (if your state permits such actions),'" but holding only that "Congress intended the state courts to have exclusive jurisdiction over private actions filed under the TCPA").

2. The Texas District Court Granted Summary Judgment to GTE on These Same Claims and to Chick-Fil-A.

Also in 1995, Petitioners filed a separate case in Harris County District Court in Texas, alleging that numerous parties violated the TCPA either directly by sending unsolicited faxes or indirectly by authorizing such faxes to be sent. Pet. 29a-30a. On March 11, 1998, after the U.S. Court of Appeals for the Fifth Circuit had dismissed the case brought in federal court against GTE and others, Petitioners amended the state court case to include GTE and, for the first time, sued Chick-Fil-A. *Id.* at 30a. The Harris County District Court dismissed Petitioners' case on the merits as to all defendants and granted

"in all things" GTE's and Chick-Fil-A's motions for summary judgment. *Id.* at 89a-92a (order granting summary judgment).

3. The Texas Court of Appeals Affirmed as to Chick-Fil-A and Remanded Certain of Petitioners' Claims Against GTE.

The Court of Appeals of Texas, Fourteenth District, Houston affirmed in part, and reversed and remanded in part. Pet. 26a (Texas Court of Appeals' decision). *First*, regarding all of the claims brought under the TCPA, the court of appeals rejected the argument that they were properly dismissed because they were brought before September 1, 1999, when Texas permitted for the first time private rights of action under the TCPA to be brought in its state courts. *Id.* at 52a. In so doing, the court declined to adopt the "opt-in" interpretation of the TCPA—and specifically the "if otherwise permitted" clause of 47 U.S.C. § 227(b)(3)—wherein parties are not authorized to bring a private right of action under the TCPA in a State's courts unless that state affirmatively authorizes such private rights of action. Pet. 52a-54a. It also rejected the "acknowledgment" interpretation advocated by Petitioners, wherein the "if otherwise permitted" language is rendered "doubly redundant." *Id.* at 53a. The court settled, instead, on an "opt-out" interpretation in which States are authorized under the "if otherwise permitted" clause to close their courts to private rights of action under the TCPA, but need take no affirmative action to permit such claims. *Id.* at 52a.

Second, the court of appeals affirmed the lower court's decision to dismiss the claims against Chick-Fil-A as time-barred on the ground that the conduct at issue occurred more than two years before suit was filed. *Id.* at 77a. The appellate court rejected Petitioners' argument that the federal residual four-year statute of limitations under 28 U.S.C. § 1658(a) applies to claims

brought under the TCPA in Texas state courts. As the court explained, "the four-year statute of limitations in section 1658(a) applies to the TCPA claims *unless another law provides otherwise*." *Id.* at 74a (emphasis added). Because the TCPA does provide otherwise by empowering each State to decide whether and under what circumstances to permit such claims to be brought in its state courts, the court reasoned, then the residual federal time limit under § 1658 is inapplicable. *Id.* at 74a-75a. Courts, therefore, should look to the particular State's law to determine the relevant statute of limitations. *Id.* Based on Texas Supreme Court precedent, the court of appeals then determined that the applicable state statute of limitations is two years and held that there was no dispute that the conduct at issue fell outside of this two-year bar. *Id.* at 75a-77a.[2]

Finally, the court of appeals reversed summary judgment on GTE's argument that it was not liable for the faxes transmitted by independently owned and operated advertisers and concluded that "there is a genuine issue of material fact as to whether the fax advertisements in question were sent by someone acting on behalf of GTE." *Id.* at 79a.[3]

4. The Texas Supreme Court Affirmed the Trial Court's Dismissal of All of the TCPA Claims.

The Texas Supreme Court reversed the lower court's decision on the central interpretation of the TCPA and held that

2. The court of appeals rejected GTE's argument that Petitioners' claims against it were time-barred, even under the court's holding that Texas's two-year statute of limitations applied. Pet. 77a-78a. This is because, "under Texas limitations law, the date of filing as to the claims against GTE . . . relate[d] back to April 12, 1995—the date the Recipients filed the Federal Suit against GTE." *Id.* at 78a.

3. *See also* Pet. 81a-82a (affirming in part and reversing in part summary judgment as to other defenses raised by GTE). Chick-Fil-A also asserted that the TCPA claims against it were barred by agency and independent contractor principles, but that issue was not reached as to Chick-Fil-A in light of the court's decision on limitations.

the "if otherwise permitted" clause of 47 U.S.C. § 227(b)(3) requires some affirmative action on the part of a state to enable parties to bring a private right of action under the TCPA in that state's courts. Pet. 20a-24a. At the outset, the Texas Supreme Court, as had the court of appeals, rejected the "acknowledgment" approach advocated by Petitioners on the principle ground that it rendered "certain language in the TCPA 'doubly redundant.'" *Id.* at 13a (citation omitted). As the court explained, there would have been no reason for Congress to "acknowledge" the background principle that, as to traditional federal statutory private rights of action, state courts of general jurisdiction are presumed to have jurisdiction to hear such claims unless Congress decides otherwise. *Id.* Moreover, because "Congress did choose to acknowledge this general principle elsewhere in the TCPA by stating that suit may be brought 'in an appropriate court of that State,'" *id.* (quoting § 227(b)(3)), "[i]nterpreting the 'if otherwise permitted' provision to have the same meaning 'would be redundant and risk rendering the words meaningless,'" *id.* (citation omitted).

The Texas Supreme Court next rejected the "opt-out" approach adopted by the court of appeals as merely an attempt by the lower court to "give a nod to *Supremacy Clause* concerns" where no such concerns are "implicated at all." *Id.* at 17a. As the supreme court explained, "giving effect to the ['if otherwise permitted'] proviso that Congress created," whether that be through the "opt-out" *or* the "opt-in" interpretation, "cannot run afoul of the *Supremacy Clause*." *Id.*

The supreme court similarly dismissed the lower court's suggestion that only the "opt-out" approach would further Congress's purpose in enacting the TCPA. Because "[t]he principal motivation behind" Congress's creation of the TCPA's private right of action was "'solicitude for states which were thwarted in their attempts to stop unwanted telemarketing,'" *id.* at 19a (citation omitted), and because "Congress recognized

the potential burden on state courts these [private rights of action] could present," *id.* at 18a, the court determined that "[t]here is strong evidence that Congress wanted to assist state regulation in reaching interstate communications *if a state so desired*," *id.* at 19a (emphasis added). Congress did not intend automatically "to create an independent regulatory framework for a potential flood of individual state-court lawsuits." *Id.*

The Texas Supreme Court then re-focused the question of interpretation on the text of the statute and, in particular, the terms "otherwise permitted." *Id.* at 20a. After analyzing the dictionary definitions of the words "otherwise" and "permit," the court reasoned that "[u]se of the words 'otherwise permitted,' then, suggests the necessity of affirmative state action to activate the TCPA's private cause of action." *Id.* at 20a-21a. The court found further support for this interpretation of the plain language in the "[c]ongressional intent underlying the TCPA" to grant "significant" and "deliberate" "deference to states, allowing them to determine whether to entertain the private TCPA claims that Congress decided to make exclusively actionable in state court." *Id.* at 21a-22a.

Finally, the supreme court applied its interpretation of the TCPA's private right of action provision—to require affirmative state action to permit a private right of action under the TCPA to be brought in its courts—to the facts of this case. "[B]ecause Texas did not otherwise permit a cause of action for the receipt of unsolicited fax advertisements until September 1, 1999," the court explained, "and the faxes at issue in this case were sent before that date, plaintiffs have no actionable claim." *Id.* at 25a. Furthermore, "[b]ecause this conclusion [wa]s dispositive," the court "d[id] not reach the parties' other arguments involving the limitations period applicable to TCPA claims and the application of Texas agency law under the facts presented here." *Id.*

REASONS FOR DENYING THE PETITION

I. Even If the Texas Courts Erred, this Case Is a Poor Vehicle for this Court's Review of the Questions Presented at this Time.

Even assuming *arguendo* that the questions presented in the petition involve issues with merit *and* that the lower courts erred in their decisions, there is nothing about this case that makes it worthy of this Court's review.

A. As Petitioners Themselves Conceded Before the Texas Supreme Court, the Unique Circumstances of this Case Are Not Likely Ever To Recur.

Because the unique circumstances of this case are not likely ever to recur, there is no reason for this Court to consider and decide the first issue Petitioners present in the context of this case. That is, the class of cases in Texas affected by the Texas Supreme Court's decision on the first issue presented is a class of one, including only Petitioners' case. This is because there is no question that the Texas Legislature has amended its laws expressly to allow parties to bring suit in Texas courts for violations of the TCPA. Pet. 2a. Since Septe[illegible]er 1, 1999, any party that has received an unsolicited fax in the State of Texas has had available to it a private right of action under the TCPA enforceable in state court. Accordingly, as of September 1, 1999, it matters not at all in the State of Texas that the Texas Supreme Court interprets the TCPA as requiring affirmative state action to execute the private right of action provision—the State of Texas has taken this affirmative step and offers all of its citizens recourse under the TCPA in its courts.

The issue of whether the TCPA's private right of action provision has independent force arose in the context of this case only because the conduct at issue allegedly took place beginning in 1993, well before the Texas Legislature enacted legislation authorizing suit in state courts under the TCPA. And, the case

against GTE has survived as long as it has only because the Texas court of appeals held that the time for filing suit in state court related back to Respondents' initial filing of the same suit in federal court in 1995. *See supra* note 2.

Petitioners breathe not a word about this timing anomaly in their petition—and for good reason—because this Court should have no interest in granting their petition where a final decision on the merits would have no effect on other parties in Texas. Indeed, Petitioners have engaged in a full retreat from their own statements before the Texas Supreme Court urging that court not to consider what Petitioners themselves called an "issue *unimportant* to Texas jurisprudence." *See* Chair King Br. 22 ("[B]ecause 28 U.S.C. § 1658 . . . provides a four-year limitations period, limitations would bar any TCPA claim accruing before 1999 that has not already been filed, making GTE's opt-in issue *unimportant to Texas jurisprudence.*" (emphasis added)). That is, Petitioners conceded below that "the opt-in *issue is no longer important* to cases filed in the last five years. . . ." *Id.* (emphasis added). Quite simply, the class of parties to which Petitioners belong, with the exception of Petitioners, is now a null set. There is, therefore, no reason to consider the questions presented under the circumstances of this case.

B. Respondents Are Aware of No State in Which Fax Recipients Are Barred from Bringing the Private Right of Action Permitted Under the TCPA.

Despite Petitioners' best efforts to suggest that the Texas Supreme Court's decision has somehow undermined legislative intent, Pet. 14-15, they have pointed to no other parties anywhere in the United States, and not just in Texas, that will be affected by the Texas Supreme Court's decision. Even taking Petitioners' alleged split of authority at face value—which must be heavily discounted upon closer examination, *see infra* Part I.C.—it is clear that no other jurisdiction requires a state legislature to

take an affirmative step to execute the private right of action under the TCPA within state courts. Pet. 8-10. And, even as to those jurisdictions where courts have held that a state could, theoretically, choose to exclude such actions from being brought in their courts, Petitioners have identified no State where the legislature has taken such a step to negate the effect of the TCPA's private right of action provision. *See* Pet. 15a (Texas Supreme Court explaining that "[o]f the courts that follow the 'opt-out' position, none has yet determined that a state has actually opted out of providing a forum for private TCPA claims."). Accordingly, Petitioners can identify no other parties anywhere in the country that are currently prevented from bringing a private right of action under the TCPA in their respective state courts.

Nor, of course, is there any reason to believe that if a future state court were to adopt the approach of the Texas Supreme Court, the relevant state legislature would fail to respond expeditiously, and follow the course chosen by the Texas Legislature, to affirmatively execute the private right of action under the TCPA within its borders.[4] Whatever the reaction of future courts and future legislatures may be, therefore, it is clear that any concern about other parties' inability to raise a TCPA claim in any state court is wholly premature and does not support the petition.

C. The Split of Authority Is Shallow and Lopsided, and Without Consequence for the Jurisdictions Implicated.

Petitioners would have this Court believe there is a fulsome 7-7-1 split of authority on the first question presented, with

4. Indeed, the Texas Legislature took this step almost immediately following a decision of a Texas district court dismissing a suit under the TCPA, where the defendant argued that "Texas had not authorized private enforcement of the TCPA when the violations occurred." *Autoflex Leasing, Inc. v. Mfrs. Auto Leasing, Inc.*, 16 S.W.3d 815, 816 (Tex. App.—Fort Worth 2000, pet. denied) (discussing lower court decision).

numerous state and federal courts taking profoundly divergent views on the interpretation of the TCPA's private right of action provision. Pet. 8-10. As explained above, even if there were such a split of authority, no other unsolicited fax recipients in the United States are affected by it, and so any split of authority is quite beside the point as to the availability of private enforcement under the TCPA. When the surface is scratched, moreover, it is clear that there is nothing on the order of a 7-7-1 split, and even taking the split in the best light for Petitioners, it is lopsided and unworthy of this Court's consideration.

First, there is, at most, a 4-1 split of authority among *state courts of last resort* (and federal courts of appeals),[5] with four state courts of last resort having adopted what some characterize as the "opt-out" or "acknowledgement" approaches, and the Texas Supreme Court adopting the so-called "opt-in" approach. *See Mulhern v. MacLeod*, 808 N.E.2d 778 (Mass. 2004) ("opt-out"); *Reynolds v. Diamond Foods & Poultry, Inc.*, 79 S.W.3d 907 (Mo. 2002) (same); *Edwards v. Direct Access, L.L.C.*, 124 P.3d 1158 (Nev. 2005) (same). Only one state court of last resort or federal court of appeals has adopted the "acknowledgement" approach. *See R.A. Ponte Architects, Ltd. v. Investors' Alert, Inc.*, 857 A.2d 1 (Md. 2004). And, the only federal court of appeals to address the issue has done so in *dicta*. *See Accounting Outsourcing, LLC v. Verizon Wireless Personal Commc'ns*, 329 F. Supp. 2d 789, 800 (M.D. La. 2004) ("[*D*]*icta* from [*Int'l Science & Tech. Inst., Inc. v. Inacom Commc'ns, Inc.*, 106 F.3d 1146 (4th Cir. 1997)] suggests that an 'opt-out' approach is the correct interpretation of the private right of action provision of the TCPA."). The shallow nature of this split counsels strongly

5. The majority of federal courts to have considered the issue have held that, although federal courts have exclusive jurisdiction over TCPA enforcement actions brought by state attorneys general and the FCC, federal courts have no jurisdiction to hear private rights of action under the TCPA. Pet. 3a The question whether federal courts have jurisdiction to hear private TCPA claims is not at issue in this case.

against this Court's consideration of the questions presented at this time.

Second, even if one were to credit the decisions of trial and intermediate courts (and *dicta*) as settled issues of law in their respective jurisdictions, purely for the sake of argument, the result is a severely lopsided 14-1 split of authority in which the Texas Supreme Court's decision is the outlier. This is because, as explained above, there is no practical difference between the acknowledgement and opt-out approaches, as Petitioners have pointed to no decision where a state was found to have opted out. *See supra* Part I.B. Such a lopsided split is grounds for denying a petition under any circumstances. Where, as here, even in the outlier jurisdiction, no parties other than Petitioners are affected by that court's decision, there can be no question that this case has none of the earmarks required to warrant the expenditure of this Court's valuable resources.

D. Petitioners Provide No Grounds for Granting the Second Question and Raise It for the First Time in Their Petition to this Court.

Petitioners' second question presented promises an issue that raises "delegation" concerns under "the Supremacy Clause," "the Tenth Amendment," and "modern notions of federalism," Pet. *i*, but the petition fails entirely to deliver. Indeed, Petitioners reference the concept of "delegation" only once in their petition, in the introductory paragraph to their argument section and without explanation. *Id.* at 7. Instead, in the few pages they devote to the statutory provision at issue, they focus exclusively on the concept of *state courts' obligation* to hear traditional federal private rights of action, *id.* at 12-13, and at no time discuss the concept of *congressional authority* to delegate to state legislatures decisions about whether a private right of action will be enforceable.

It is not surprising that Petitioners have failed to supply this Court with any reason to grant the second question presented, as they never presented, let alone developed, this argument below. Thus, even if this question were an interesting one over which state courts of last resort and federal courts of appeals were sharply divided—a position Petitioners do not even attempt to advance in their petition—it is not one properly presented to this Court.

E. For Several Reasons, the Third Question Presented Is Also Not Worthy of this Court's Review.

Petitioners also attempt to squeeze in a third question presented, regarding which statute of limitations applies to claims brought under the TCPA in Texas courts, that similarly presents vehicle problems in this case and bears none of the attributes of a question worthy of this Court's review. *First*, the statute of limitations question was never passed upon by the Texas Supreme Court. Its decision on the unavailability of TCPA actions in Texas courts before 1999 rendered the limitations issue moot. Pet. 25a. There is, therefore, no well-reasoned, or indeed any, decision from the highest state court on the limitations issue, and any review by this Court of this question would be premature.

Second, despite Petitioners' contention, Pet. 21, there is no conflict among the state courts of last resort on the limitations issue. Of the three States whose courts have considered the issue according to Petitioners, *id.*, only one, Nevada, has had its high court rule on the issue. *See Edwards v. Emperor's Garden Rest.*, 130 P.3d 1280 (Nev. 2006). Moreover, contrary to the statements in the petition, the Nevada Supreme Court ruled similarly to the Texas court of appeals here, and held that TCPA claims are governed by Nevada's two-year statute of limitations, not the federal residual statute of limitations. *Id.* at 1286-87; Pet. 21 (incorrectly citing *Edwards* for the proposition that the federal statute of limitations applies to TCPA claims). Indeed, the

Nevada Supreme Court's decision closely followed the analysis of the court of appeals in this case. *Edwards*, 130 P.3d at 1286-87.

Moreover, the only case cited by Petitioners in which a court applied the federal four-year period, a New Jersey superior court decision, acknowledges that § 1658 would not apply if a shorter period existed under state law. *See Zelma v. Konikow*, 879 A.2d 1185, 1190 (N.J. Super. Ct. App. Div. 2005). Because there is no genuine conflict among the state courts—much less a conflict among state courts of last resort—there is simply no reason for this Court to consider the limitations issue at this time.

F. There Are Alternative Grounds for Affirmance of the Texas Supreme Court's Decision.

Because it determined that Petitioners could not state a claim under the TCPA in Texas prior to September 1, 1999, the Texas Supreme Court also did not need to consider the alternative grounds under which Petitioners' claims could be dismissed. Pet. 25a. There is little doubt that the Texas Supreme Court would find in Respondents' favor under these alternative theories. For example, as explained above, the Texas Supreme Court did not reach the limitations issue on which the Texas appellate court correctly held that the claims against Chick-Fil-A were time-barred under Texas's two-year statute of limitations. And, as both GTE and Chick-Fil-A argued before the Texas Supreme Court, the trial court properly granted summary judgment in their favor because they were not liable for the faxes at issue, which were transmitted by independent advertising companies on behalf of independent retailers.[6] This is simply not a case in which this Court's reconsideration would

6. In fact, Petitioners sued and settled with the independent advertising companies allegedly responsible for the faxes at issue early in the history of this case.

necessarily, or even likely, have any ultimate effect on the adjudication of rights between the parties.

II. The Court Below Correctly Interpreted the TCPA as Respecting Each State's Decision Whether To Permit a Private Right of Action To Be Brought in Its Courts.

In any event, this Court should deny the petition because the Texas Supreme Court correctly interpreted the TCPA to rely on the States to decide whether to permit private rights of action regarding unsolicited faxes to be raised in their courts.

A. The Plain Terms, Purpose, and History of the TCPA All Make Clear that It Conditions the Availability of a Private Right of Action on State Action.

Nowhere in the single sentence Petitioners devote to the language of 47 U.S.C. § 227(b)(3) do they attempt to address the meaning of the actual terms employed by Congress. Pet. 13. Instead, they simply import an inapt standard that the language be "unmistakably clear" and then summarily conclude that it is not. *Id.*; *see infra* Part II.B.1. If one actively engages the language, however, it *is* clear that § 227(b)(3), by its plain terms, conditions the availability of the TCPA's private right of action in any particular State on that State's decision whether to permit it. This understanding is bolstered by Congress's purpose in enacting the TCPA—to empower those States who desire to take action to reach interstate conduct.

First, the Texas Supreme Court properly "beg[an] with the text of the statutory proviso," Pet. 20a, which, in context, states: "A person or entity may, *if otherwise permitted by the laws or rules of court of a State*, bring in an appropriate court of that state" a private right of action "based on a violation of" the TCPA, 47 U.S.C. § 227(b)(3) (emphasis added). It is unmistakably clear that the term "if" signals a clause that creates a condition precedent which must be satisfied before the remainder of the provision can take effect. *See, e.g.*, Merriam-

Webster's Collegiate Dictionary 575 (10th ed. 2001) (defining "if" to mean, *inter alia*, "in the event that" and "on condition that"); *Adirondack Transit Lines, Inc. v. United Transp. Union*, 305 F.3d 82, 87 (2d Cir. 2002) ("If" is "a small word with large legal significance. . . . we agree . . . that this language creates an express condition precedent. . . " (citing 13 Richard A. Lord, Williston on Contracts § 38:16 (4th ed. 2000))); *see also* Black's Law Dictionary 746 (6th ed. 1990) ("In deeds and wills, this word, as a rule, implies a condition precedent . . . .").

With this logical connector in place, the court thus focused on the key terms "otherwise permitted" to determine how the condition is to be satisfied:

> The term "otherwise" denotes "(1) in a different way or manner: DIFFERENTLY; (2) in different circumstances: under other conditions." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1961). And "permit" is defined as "(1) to consent to expressly or formally: grant leave for or the privilege of: ALLOW, TOLERATE; (2) to give (a person) leave: AUTHORIZE; . . . (4) to make possible." *Id.*

Pet. 20a-21a. "Use of the words 'otherwise permitted,' then," according to the court, "suggests the necessity of affirmative state action to activate the TCPA's private cause of action." *Id.* at 21a. That is, the condition that must be satisfied in order for a party to have available to it the private right of action contemplated by § 227(b)(3) is the presence of a separate and distinct state consent or authorization permitting the action to be brought in the state's courts.

Second, the purpose of the TCPA also supports this reading of § 227(b)(3), which defers to the States to decide whether to entertain such actions in their courts. As explained above, while most States had taken an active role in protecting their citizens against certain unsolicited *intrastate* phone calls and/or faxes

before 1991, they lacked authority under federal law to reach *interstate* phone calls and faxes. *See supra* pp. 3-4. There is no question, therefore, that one of the primary purposes motivating Congress's enactment of the TCPA was to supplement the efforts of the more than 40 States that had already passed laws prohibiting such conduct by extending the restrictions to certain interstate phone calls and faxes. *See id.*

Nonetheless, Congress "was surely conscious that," if it were to enact a self-executing private right of action under the TCPA, "state courts could suddenly be burdened with a potential flood of unsolicited-fax suits." Pet. 21a. Accordingly, although Congress adopted a uniform federal prohibition on the "use [of] any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement" that applies to intrastate and interstate faxes alike, 47 U.S.C. § 227(b)(1)(C), *and* authorized state attorneys general to bring enforcement actions in the federal courts, *id.* § 227(f), it is not at all strange that Congress would have deferred to each State to decide whether additionally to permit private suits to be brought in its courts. Indeed, it makes perfect sense that, given both its desire to aid the States in combating unsolicited telephone calls and faxes and its recognition that private rights of action could flood the courts, Congress would defer to the States on whether to activate this tool of enforcement under the TCPA. *Cf. Int'l Sci. & Tech. Inst.*, 106 F.3d at 1157 ("Congress acted rationally in both closing federal courts and allowing states to close theirs to the millions of private actions that could be filed if only a small portion of each year's 6.57 billion telemarketing transmissions were illegal under the TCPA.").

Finally, the legislative history lends further support to the Texas Supreme Court's reading of the TCPA's private right of action provision. When Senator Hollings "introduced the

substitute bill containing the private right of action eventually codified at 47 U.S.C. § 227(b)(3)," Pet. 11a, he explained what he saw as the virtues of permitting consumers to bring their own actions under the TCPA, 137 Cong. Rec. S16,205-06 (daily ed. Nov. 7, 1991) ("Sen. Hollings's Statement"). He did not, however, suggest that such actions would automatically be permissible with the enactment of the provision at issue. On the contrary, he expressed his "hope that States will make it as easy as possible for consumers to bring such actions," and urged "States [to] act reasonably in permitting their citizens to go to court to enforce this bill." *Id.* Quite simply, there would have been no reason for him to urge such state action if he believed that none was required. Thus, because the plain text, the purpose, and the history of the TCPA all support the Texas Supreme Court's interpretation, there is simply no reason for this Court to reconsider the issue.

B. Petitioners' Arguments to the Contrary Are Unavailing.

None of Petitioners' scanty arguments regarding the Texas Supreme Court's interpretation of the TCPA's private right of action provision is persuasive.

1. The Presumption in Favor of Concurrent State Court Jurisdiction Is Not Applicable Here.

Petitioners' only attempt at interpreting the statutory language at issue rests solely on the flawed premise that this case implicates the considerations at issue in *Tafflin v. Levitt*, 493 U.S. 455 (1990). Pet. 12. It is no surprise that Petitioners fail to identify the presumption actually at work in *Tafflin*—"the presumption in favor of concurrent state court jurisdiction," *Tafflin*, 493 U.S. at 459—because to state the presumption is to reveal its inapplicability. This case, and the statutory provision at issue, does not present the question whether state courts have *concurrent jurisdiction* to hear a traditional federal private right

of action. The statute makes clear that *if* the private right of action is otherwise made enforceable or activated by the State, Congress intended for state courts to have jurisdiction over such claims. *See* 47 U.S.C. § 227(b)(3) ("A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate *court of that State*" a private right of action. (emphasis added)). Indeed, the majority of the courts to have considered the question have determined that state courts have *exclusive jurisdiction* over such claims. *See supra* n.5.

The question in this case is instead whether the "if otherwise permitted" clause requires some form of consent from the State before the private right of action is activated and available at all, in any court. As to this question, the presumption embodied in *Tafflin*, *Testa v. Katt*, 330 U.S. 386 (1947), and the other cases cited by Petitioners, Pet. 12, is wholly inapplicable.[7] *See* Pet. 9a-10a. Because Petitioners make no attempt to interpret the statutory language on its own, and not simply within the context of an inapt "unmistakably clear" standard, *id.* at 13, they have failed to present to this Court any viable argument that the Texas Supreme Court's interpretation was in error.

2. Neither of Petitioners' Alternative Readings of the Statutory Language at Issue Is Convincing.

Apparently Petitioners themselves have not yet settled on what they believe to be the correct interpretation of the statutory provision at issue. Although they assert that any reading that would empower "state legislatures . . . to decide whether their courts will entertain TCPA claims"— presumably including both the "opt-in" *and* "opt-out" interpretations—"raises serious Supremacy Clause and federalism concerns," they concede that

7. Even if such a presumption did apply, however, the plain text, purpose, and history of the TCPA all support an unmistakably clear reading that the State's affirmative consent is required before the TCPA's private right of action can be enforceable in the state's courts. *See supra* Part II.A.

they "argued in favor of" *both* "the acknowledgement" *and* the "opt-out" theories in the court below. Pet. 7-8. They, thus, make no attempt to offer a single coherent reading of the statute and instead embrace only the notion that § 227(b)(3) means anything other than the interpretation adopted by the Texas Supreme Court.

Nor could they offer such an alternative coherent reading of the statute. As the Texas Supreme Court explained, the "acknowledgement" approach suffers from a critical interpretive infirmity—it violates the cardinal canon of construction directing that every word of a statute be given meaning.[8] That is, under the "acknowledgement" theory, the "if otherwise permitted" clause merely "acknowledges" what Supreme Court precedent already requires, namely the "general rule that a state may not decline to enforce a federal cause of action," Pet. 9a, and recognition of "states' rights to structure their court systems," *id.* at 11a. Under this reading, however, the clause has no independent force or purpose. Petitioners also cannot explain why Congress would have redundantly clarified that such claims were to be brought "in an appropriate court of that State." 47 U.S.C. § 227(b)(3). As the court below explained, such a "[f]ailure to give" independent "effect to the statutory proviso would itself run the risk of violating the *Supremacy Clause* by refusing to apply the federal right as written." Pet. 11a.

The "opt-out" theory fares no better as it appears merely to provide an unsubstantiated halfway point between the flawed "acknowledgement" theory and the "opt-in" interpretation,

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8. *See, e.g., Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("It is our duty to give effect, if possible, to every clause and word of a statute. . . . [T]his rule [is] a cardinal principle of statutory construction. . . . [A] statute ought . . . to be so construed that . . . no clause, sentence, or word shall be superfluous, void, or insignificant[.]" (internal quotations omitted) (citations omitted)).

which is fully supported by the "otherwise permitted" language. *See supra* Part II.A; Pet. 17a-20a. Although the "opt-out" theory has the benefit over the "acknowledgement" approach of giving force and effect to the statutory proviso by accepting that States have a role to play in determining whether the TCPA private right of action will be enforceable in their courts, it fails to give full force and effect to the word "permitted," which, as the Texas Supreme Court held, requires *affirmative* consent or authorization. *See supra* Part II.A. It likewise fails to explain why Senator Hollings would find it necessary to urge the States affirmatively to "*make it* as easy as possible for consumers to bring such actions" and *to* "*act* reasonably in permitting their citizens to go to court to enforce this bill." Sen. Hollings's Statement at S16,205-06 (emphases added). Because Petitioners fail genuinely to advance either alternative reading of § 227(b)(3), and neither reading is coherent in any event, there is no reason for this Court to reconsider the Texas Supreme Court's sound interpretation at their behest.

3. Petitioners Also Fail To Recognize that the TCPA Is Enforceable Through Other Means Regardless of the Availability of Private Actions in a State's Courts.

Finally, it is clear that much of Petitioners' failure to grasp how the TCPA's private right of action provision was intended to work is based on their refusal to recognize how the TCPA is structured. Much of Petitioners' argument is based on the faulty premise that, under the "opt-in" approach, if a state fails to act, then there is no enforceable federal prohibition. *See, e.g.*, Pet. 14 ("[I]f there is no federal question jurisdiction and no state is obliged to hear such claims, the only way TCPA claims could be heard would be as claims asserting federal diversity jurisdiction."); *id.* (assuming that if states did not pass "'enabling' legislation," there is "no restriction at all" under the TCPA). As explained above, however, the TCPA includes a

uniform federal prohibition against certain conduct, 47 U.S.C. § 227(b)(1), that can be enforced by states attorneys general in federal court and on behalf of their residents, *id.* § 227(f), separate and apart from any private right of action contemplated under § 227(b)(3).[9] Thus, the TCPA's prohibition is fully operational and binding on all parties throughout the United States, and the TCPA is in no way "render[ed] . . . meaningless," under the Texas Supreme Court's interpretation of § 227(b)(3).

III. The Texas Intermediate Court Correctly Applied the Texas Two-Year Limitations Period to the Claims at Issue.

This Court should also deny the petition because the Texas Court of Appeals correctly interpreted the TCPA to incorporate Texas's two-year statute of limitations as to private TCPA actions brought in Texas state courts. On the limitations issue, as with the question whether TCPA claims were available at all in Texas courts before 1999, Petitioners engage in an enterprise of selective interpretation without making any attempt to harmonize *all* of the language of the federal residual limitations provision, 28 U.S.C. § 1658, with the TCPA provision at issue.

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9. Equally unavailing is petitioners' argument that 47 U.S.C. § 227(e) precludes an "opt-in" interpretation. Pet. 14. Section 227(e) by its terms and in context simply makes clear that, although any state restrictions on unsolicited *interstate* faxes are obviously preempted, states are not expressly prohibited from "impos[ing] more restrictive *intrastate* requirements or regulations" under the circumstances prescribed. *Id.* § 227(e)(1) (emphasis added). Because the TCPA's uniform federal prohibition is unaffected by any portion of the private right of action provision, a state's failure to act under § 227(b)(3) does not negate that uniform federal prohibition or preclude its enforcement by state attorneys general in federal court. In other words, a state could decide to impose "no restriction at all," and decline to activate the private right of action, without in any way "rendering § 227(e) meaningless" or defeating the purpose of the TCPA. Pet. 14.

Petitioners' theory is simple: "the TCPA is a federal law, was enacted after § 1658 [was enacted], and has no limitations period"; *ergo*, the residual four-year limitations period of § 1658 applies to claims brought under the TCPA. Pet. 16. This oversimplification, however, contains two fundamental flaws. First, it reads the first and most critical clause directly out of § 1658. Section 1658 provides:

> (a) *Except as otherwise provided by law*, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues.

Id. (emphasis added). It is this first condition in § 1658 that makes it "residual" and renders it a provision of last resort. Only where no other federal law provides for another mechanism of incorporating a different statute of limitations does § 1658 serve any purpose at all. Thus the court of appeals correctly concluded that the federal residual limitations period applies "unless another law provides otherwise." Pet. 74a-75a.

Second, Petitioners then refuse entirely to inquire whether any law does otherwise provide. Indeed, just as they fail to engage the TCPA's language to determine the availability of private rights of action in Texas state courts before 1999, Petitioners similarly ignore the TCPA's text in determining whether the default limitations period of § 1658 applies. As the Texas Court of Appeals explained, the TCPA does "otherwise provide[]" because the TCPA allows the pursuit of private claims in state court only if state law permits it. Pet. 74a-75a (citing 47 U.S.C. § 227(b)(3)).[10] That is, although the private right of

10. Although the appellate court did correctly determine that the "if otherwise permitted" language incorporates state statutes of limitations, the Texas Supreme Court also correctly determined that this same language further requires the States to take affirmative action

(Cont'd)

action provision in the TCPA does not include an express statute of limitations, labeled as such, its "if otherwise permitted" clause incorporates all applicable state laws into defining when such an action will be available in the state courts. Because, under Texas law, such claims cannot be brought in state court outside of a two-year limitations period, such claims are not "otherwise permitted" to be brought. This reading of § 1658 and the TCPA together is the only way to harmonize all of the language of both statutes.

Moreover, this reading is further supported by the history and purpose of the TCPA. As explained above, this federal legislation was necessary because the individual States had no authority to regulate interstate fax activity. *See supra* pp. 3-4; Pet. 6a. "Thus, although Congress created the private TCPA action, it was from the beginning a cause of action in the states' interest." *Aronson v. Fax.com, Inc.*, 51 Pa. D. & C.4th 421, 426 (C.P. 2001). In fact, Petitioners do not dispute that, to this end, Congress expected private rights of action to be brought in state courts. *See* Sen. Hollings's Statement at S16,204-06 ("The provision would allow consumers to bring an action in State court against any entity that violates the bill."); *id.* at S16,205 ("[I]t is my hope that States will make it as easy as possible for consumers to bring such actions, preferably in small claims court."). It is no surprise, therefore, that Congress would have deferred to the States to determine *when* such actions could be brought in their courts.

Petitioners' arguments to the contrary are unavailing. For example, they cite this Court's decision in *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369 (2004), as support for their argument that § 1658 has a broad application and therefore governs TCPA claims. Pet. 19-20. In *Jones*, however, this Court addressed the limitations provision for claims arising under

(Cont'd)
to enable such suits to be brought in their courts at any time. *See supra* Part II.A.

42 U.S.C. § 1981, as amended by the Civil Rights Act of 1991. 541 U.S. at 371-72. Section 1981 includes no provision comparable to the "if otherwise permitted" language of the TCPA. *Jones* dealt instead simply with claims over which federal courts have subject matter jurisdiction, not private TCPA claims over which federal courts do not have subject matter jurisdiction and the States determine whether the action is available in their courts. *See Jones*, 541 U.S. at 378 (discussing only federal claims within the subject matter jurisdiction of federal courts).[11]

Although they do not challenge the fact that the States have the power to structure their courts as necessary to administer TCPA claims, Petitioners nevertheless maintain that TCPA claims fall under the federal limitations period because state attorneys general may enforce the TCPA on behalf of their citizens in federal court. Pet. 20. If anything, the fact that Congress separately authorized certain actions to be brought in federal court (i.e., attorney general actions and certain FCC actions) suggests that *private claims* are to be treated differently, and just as Congress provided—as state actions to be brought in state court. When Congress wanted to provide federal jurisdiction for TCPA claims, it did so expressly. *See* 47 U.S.C. § 227(f)(2). With respect to private actions, however, Congress was clear in its intent—it expected private actions to be brought in state courts—and only "if otherwise permitted" in such courts. 47 U.S.C. § 227(b)(3), § 227(c)(5). Quite simply, Congress created different mechanisms for enforcement of the TCPA and assigned different limitations and parameters to each mechanism. Even if one assumes that § 1658's residual period applies to attorney general and FCC actions, there is every reason to believe, based on the structure and language of the TCPA,

11. For this same reason, Petitioners' arguments concerning the complexities of borrowing state limitations periods for federal claims over which federal courts have jurisdiction are irrelevant. Pet. 16-21.

that they intended for state limitations periods to apply to private actions brought in state courts.[12]

CONCLUSION

For the foregoing reasons, Respondents respectfully submit that the petition for writ of certiorari should be denied. If this Court grants the petition, it should adopt the counter-questions presented.

Respectfully submitted,

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12. Petitioners also contend that Congress did not remove federal diversity jurisdiction when it enacted the TCPA. Pet. 19 (citing *Accounting Outsourcing, LLC v. Verizon Wireless Personal Comm., L.P.*, 329 F. Supp. 2d 789 (M.D. La. 2004)). This argument is another red herring as Petitioners do no more than pose a hypothetical factual scenario where they believe § 1658 might apply. This case does not meet the factual parameters of Petitioners' hypothetical. Here, the lower courts were not faced with an issue of federal diversity jurisdiction, so whether diversity jurisdiction lies in a TCPA claim is an issue that is not before this Court.

APPENDIX

APPENDIX A

47 U.S.C. § 227*

§ 227. Restrictions on use of telephone equipment

(a) Definitions

As used in this section—

(1) The term "automatic telephone dialing system" means equipment which has the capacity—

(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and

(B) to dial such numbers.

(2) The term "established business relationship", for purposes only of subsection (b)(1)(C)(i) of this section, shall have the meaning given the term in section 64.1200 of title 47, Code of Federal Regulations, as in effect on January 1, 2003, except that—

(A) such term shall include a relationship between a person or entity and a business subscriber subject to the same terms applicable under such section to a relationship between a person or entity and a residential subscriber; and

(B) an established business relationship shall be subject to any time limitation established pursuant to paragraph (2)(G)).

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* Although this section was amended in 2005, *see* Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359, § 227(b)(3) was unaffected. The full text of the current § 227 is included for the convenience of the Court.

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(3) The term "telephone facsimile machine" means equipment which has the capacity (A) to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or (B) to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.

(4) The term "telephone solicitation" means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, but such term does not include a call or message (A) to any person with that person's prior express invitation or permission, (B) to any person with whom the caller has an established business relationship, or (C) by a tax exempt nonprofit organization.

(5) The term "unsolicited advertisement" means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise.

(b) Restrictions on use of automated telephone equipment

(1) Prohibitions

It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States—

(A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice—

Appendix A

(i) to any emergency telephone line (including any "911" line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency);

(ii) to the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment; or

(iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call;

(B) to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by rule or order by the Commission under paragraph (2)(B);

(C) to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement, unless—

(i) the unsolicited advertisement is from a sender with an established business relationship with the recipient;

(ii) the sender obtained the number of the telephone facsimile machine through—

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(I) the voluntary communication of such number, within the context of such established business relationship, from the recipient of the unsolicited advertisement, or

(II) a directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution,

except that this clause shall not apply in the case of an unsolicited advertisement that is sent based on an established business relationship with the recipient that was in existence before July 9, 2005, if the sender possessed the facsimile machine number of the recipient before such date of enactment; and

(iii) the unsolicited advertisement contains a notice meeting the requirements under paragraph (2)(D),

except that the exception under clauses (i) and (ii) shall not apply with respect to an unsolicited advertisement sent to a telephone facsimile machine by a sender to whom a request has been made not to send future unsolicited advertisements to such telephone facsimile machine that complies with the requirements under paragraph (2)(E); or

(D) to use an automatic telephone dialing system in such a way that two or more telephone lines of a multi-line business are engaged simultaneously.

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(2) Regulations; exemptions and other provisions

The Commission shall prescribe regulations to implement the requirements of this subsection. In implementing the requirements of this subsection, the Commission—

(A) shall consider prescribing regulations to allow businesses to avoid receiving calls made using an artificial or prerecorded voice to which they have not given their prior express consent;

(B) may, by rule or order, exempt from the requirements of paragraph (1)(B) of this subsection, subject to such conditions as the Commission may prescribe—

(i) calls that are not made for a commercial purpose; and

(ii) such classes or categories of calls made for commercial purposes as the Commission determines—

(I) will not adversely affect the privacy rights that this section is intended to protect; and

(II) do not include the transmission of any unsolicited advertisement;

(C) may, by rule or order, exempt from the requirements of paragraph (1)(A)(iii) of this subsection calls to a telephone number assigned to a cellular telephone service that are not charged to the called party, subject to such conditions as the Commission may prescribe as necessary in the interest of the privacy rights this section is intended to protect;

(D) shall provide that a notice contained in an unsolicited advertisement complies with the requirements under this subparagraph only if—

(i) the notice is clear and conspicuous and on the first page of the unsolicited advertisement;

(ii) the notice states that the recipient may make a request to the sender of the unsolicited advertisement not to send any future unsolicited advertisements to a telephone facsimile machine or machines and that failure to comply, within the shortest reasonable time, as determined by the Commission, with such a request meeting the requirements under subparagraph (E) is unlawful;

(iii) the notice sets forth the requirements for a request under subparagraph (E);

(iv) the notice includes—

(I) a domestic contact telephone and facsimile machine number for the recipient to transmit such a request to the sender; and

(II) a cost-free mechanism for a recipient to transmit a request pursuant to such notice to the sender of the unsolicited advertisement; the Commission shall by rule require the sender to provide such a mechanism and may, in the discretion of the Commission and subject to such conditions as the Commission may prescribe, exempt certain classes of small business

senders, but only if the Commission determines that the costs to such class are unduly burdensome given the revenues generated by such small businesses;

(v) the telephone and facsimile machine numbers and the cost-free mechanism set forth pursuant to clause (iv) permit an individual or business to make such a request at any time on any day of the week; and

(vi) the notice complies with the requirements of subsection (a) of this section;

(E) shall provide, by rule, that a request not to send future unsolicited advertisements to a telephone facsimile machine complies with the requirements under this subparagraph only if—

(i) the request identifies the telephone number or numbers of the telephone facsimile machine or machines to which the request relates;

(ii) the request is made to the telephone or facsimile number of the sender of such an unsolicited advertisement provided pursuant to subparagraph (D)(iv) or by any other method of communication as determined by the Commission; and

(iii) the person making the request has not, subsequent to such request, provided express invitation or permission to the sender, in writing or otherwise, to send such advertisements to such person at such telephone facsimile machine;

(F) may, in the discretion of the Commission and subject to such conditions as the Commission may prescribe, allow professional or trade associations that are tax-exempt nonprofit organizations to send unsolicited advertisements to their members in furtherance of the association's tax-exempt purpose that do not contain the notice required by paragraph (1)(C)(iii), except that the Commission may take action under this subparagraph only—

(i) by regulation issued after public notice and opportunity for public comment; and

(ii) if the Commission determines that such notice required by paragraph (1)(C)(iii) is not necessary to protect the ability of the members of such associations to stop such associations from sending any future unsolicited advertisements; and

(G)(i) may, consistent with clause (ii), limit the duration of the existence of an established business relationship, however, before establishing any such limits, the Commission shall—

(I) determine whether the existence of the exception under paragraph (1)(C) relating to an established business relationship has resulted in a significant number of complaints to the Commission regarding the sending of unsolicited advertisements to telephone facsimile machines;

(II) determine whether a significant number of any such complaints involve unsolicited advertisements

that were sent on the basis of an established business relationship that was longer in duration than the Commission believes is consistent with the reasonable expectations of consumers;

(III) evaluate the costs to senders of demonstrating the existence of an established business relationship within a specified period of time and the benefits to recipients of establishing a limitation on such established business relationship; and

(IV) determine whether with respect to small businesses, the costs would not be unduly burdensome; and

(ii) may not commence a proceeding to determine whether to limit the duration of the existence of an established business relationship before the expiration of the 3-month period that begins on July 9, 2005.

(3) Private right of action

A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State—

(A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater, or

(C) both such actions.

If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

(c) Protection of subscriber privacy rights

(1) Rulemaking proceeding required

Within 120 days after December 20, 1991, the Commission shall initiate a rulemaking proceeding concerning the need to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object. The proceeding shall—

(A) compare and evaluate alternative methods and procedures (including the use of electronic databases, telephone network technologies, special directory markings, industry-based or company-specific "do not call" systems, and any other alternatives, individually or in combination) for their effectiveness in protecting such privacy rights, and in terms of their cost and other advantages and disadvantages;

(B) evaluate the categories of public and private entities that would have the capacity to establish and administer such methods and procedures;

(C) consider whether different methods and procedures may apply for local telephone solicitations, such as local telephone solicitations of small businesses or holders of second class mail permits;

(D) consider whether there is a need for additional Commission authority to further restrict telephone solicitations, including those calls exempted under subsection (a)(3) of this section, and, if such a finding is made and supported by the record, propose specific restrictions to the Congress; and

(E) develop proposed regulations to implement the methods and procedures that the Commission determines are most effective and efficient to accomplish the purposes of this section.

(2) Regulations

Not later than 9 months after December 20, 1991, the Commission shall conclude the rulemaking proceeding initiated under paragraph (1) and shall prescribe regulations to implement methods and procedures for protecting the privacy rights described in such paragraph in an efficient, effective, and economic manner and without the imposition of any additional charge to telephone subscribers.

(3) Use of database permitted

The regulations required by paragraph (2) may require the establishment and operation of a single national database to compile a list of telephone numbers of residential subscribers

who object to receiving telephone solicitations, and to make that compiled list and parts thereof available for purchase. If the Commission determines to require such a database, such regulations shall—

(A) specify a method by which the Commission will select an entity to administer such database;

(B) require each common carrier providing telephone exchange service, in accordance with regulations prescribed by the Commission, to inform subscribers for telephone exchange service of the opportunity to provide notification, in accordance with regulations established under this paragraph, that such subscriber objects to receiving telephone solicitations;

(C) specify the methods by which each telephone subscriber shall be informed, by the common carrier that provides local exchange service to that subscriber, of (i) the subscriber's right to give or revoke a notification of an objection under subparagraph (A), and (ii) the methods by which such right may be exercised by the subscriber;

(D) specify the methods by which such objections shall be collected and added to the database;

(E) prohibit any residential subscriber from being charged for giving or revoking such notification or for being included in a database compiled under this section;

(F) prohibit any person from making or transmitting a telephone solicitation to the telephone number of any subscriber included in such database;

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(G) specify (i) the methods by which any person desiring to make or transmit telephone solicitations will obtain access to the database, by area code or local exchange prefix, as required to avoid calling the telephone numbers of subscribers included in such database; and (ii) the costs to be recovered from such persons;

(H) specify the methods for recovering, from persons accessing such database, the costs involved in identifying, collecting, updating, disseminating, and selling, and other activities relating to, the operations of the database that are incurred by the entities carrying out those activities;

(I) specify the frequency with which such database will be updated and specify the method by which such updating will take effect for purposes of compliance with the regulations prescribed under this subsection;

(J) be designed to enable States to use the database mechanism selected by the Commission for purposes of administering or enforcing State law;

(K) prohibit the use of such database for any purpose other than compliance with the requirements of this section and any such State law and specify methods for protection of the privacy rights of persons whose numbers are included in such database; and

(L) require each common carrier providing services to any person for the purpose of making telephone solicitations to notify such person of the requirements of this section and the regulations thereunder.

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(4) Considerations required for use of database method

If the Commission determines to require the database mechanism described in paragraph (3), the Commission shall—

(A) in developing procedures for gaining access to the database, consider the different needs of telemarketers conducting business on a national, regional, State, or local level;

(B) develop a fee schedule or price structure for recouping the cost of such database that recognizes such differences and—

(i) reflect the relative costs of providing a national, regional, State, or local list of phone numbers of subscribers who object to receiving telephone solicitations;

(ii) reflect the relative costs of providing such lists on paper or electronic media; and

(iii) not place an unreasonable financial burden on small businesses; and

(C) consider (i) whether the needs of telemarketers operating on a local basis could be met through special markings of area white pages directories, and (ii) if such directories are needed as an adjunct to database lists prepared by area code and local exchange prefix.

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(5) Private right of action

A person who has received more than one telephone call within any 12-month period by or on behalf of the same entity in violation of the regulations prescribed under this subsection may, if otherwise permitted by the laws or rules of court of a State bring in an appropriate court of that State—

(A) an action based on a violation of the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to receive up to $500 in damages for each such violation, whichever is greater, or

(C) both such actions.

It shall be an affirmative defense in any action brought under this paragraph that the defendant has established and implemented, with due care, reasonable practices and procedures to effectively prevent telephone solicitations in violation of the regulations prescribed under this subsection. If the court finds that the defendant willfully or knowingly violated the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

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(6) Relation to subsection (b)

The provisions of this subsection shall not be construed to permit a communication prohibited by subsection (b) of this section.

(d) Technical and procedural standards

(1) Prohibition

It shall be unlawful for any person within the United States—

(A) to initiate any communication using a telephone facsimile machine, or to make any telephone call using any automatic telephone dialing system, that does not comply with the technical and procedural standards prescribed under this subsection, or to use any telephone facsimile machine or automatic telephone dialing system in a manner that does not comply with such standards; or

(B) to use a computer or other electronic device to send any message via a telephone facsimile machine unless such person clearly marks, in a margin at the top or bottom of each transmitted page of the message or on the first page of the transmission, the date and time it is sent and an identification of the business, other entity, or individual sending the message and the telephone number of the sending machine or of such business, other entity, or individual.

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(2) Telephone facsimile machines

The Commission shall revise the regulations setting technical and procedural standards for telephone facsimile machines to require that any such machine which is manufactured after one year after December 20, 1991, clearly marks, in a margin at the top or bottom of each transmitted page or on the first page of each transmission, the date and time sent, an identification of the business, other entity, or individual sending the message, and the telephone number of the sending machine or of such business, other entity, or individual.

(3) Artificial or prerecorded voice systems

The Commission shall prescribe technical and procedural standards for systems that are used to transmit any artificial or prerecorded voice message via telephone. Such standards shall require that—

(A) all artificial or prerecorded telephone messages (i) shall, at the beginning of the message, state clearly the identity of the business, individual, or other entity initiating the call, and (ii) shall, during or after the message, state clearly the telephone number or address of such business, other entity, or individual; and

(B) any such system will automatically release the called party's line within 5 seconds of the time notification is transmitted to the system that the called party has hung up, to allow the called party's line to be used to make or receive other calls.

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(e) Effect on State law

(1) State law not preempted

Except for the standards prescribed under subsection (d) of this section and subject to paragraph (2) of this subsection, nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits—

(A) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements;

(B) the use of automatic telephone dialing systems;

(C) the use of artificial or prerecorded voice messages; or

(D) the making of telephone solicitations.

(2) State use of databases

If, pursuant to subsection (c)(3) of this section, the Commission requires the establishment of a single national database of telephone numbers of subscribers who object to receiving telephone solicitations, a State or local authority may not, in its regulation of telephone solicitations, require the use of any database, list, or listing system that does not include the part of such single national database that relates to such State.

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(f) Actions by States

(1) Authority of States

Whenever the attorney general of a State, or an official or agency designated by a State, has reason to believe that any person has engaged or is engaging in a pattern or practice of telephone calls or other transmissions to residents of that State in violation of this section or the regulations prescribed under this section, the State may bring a civil action on behalf of its residents to enjoin such calls, an action to recover for actual monetary loss or receive $500 in damages for each violation, or both such actions. If the court finds the defendant willfully or knowingly violated such regulations, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under the preceding sentence.

(2) Exclusive jurisdiction of Federal courts

The district courts of the United States, the United States courts of any territory, and the District Court of the United States for the District of Columbia shall have exclusive jurisdiction over all civil actions brought under this subsection. Upon proper application, such courts shall also have jurisdiction to issue writs of mandamus, or orders affording like relief, commanding the defendant to comply with the provisions of this section or regulations prescribed under this section, including the requirement that the defendant take such action as is necessary to remove the danger of such violation. Upon a proper showing, a permanent or temporary injunction or restraining order shall be granted without bond.

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(3) Rights of Commission

The State shall serve prior written notice of any such civil action upon the Commission and provide the Commission with a copy of its complaint, except in any case where such prior notice is not feasible, in which case the State shall serve such notice immediately upon instituting such action. The Commission shall have the right (A) to intervene in the action, (B) upon so intervening, to be heard on all matters arising therein, and (C) to file petitions for appeal.

(4) Venue; service of process

Any civil action brought under this subsection in a district court of the United States may be brought in the district wherein the defendant is found or is an inhabitant or transacts business or wherein the violation occurred or is occurring, and process in such cases may be served in any district in which the defendant is an inhabitant or where the defendant may be found.

(5) Investigatory powers

For purposes of bringing any civil action under this subsection, nothing in this section shall prevent the attorney general of a State, or an official or agency designated by a State, from exercising the powers conferred on the attorney general or such official by the laws of such State to conduct investigations or to administer oaths or affirmations or to compel the attendance of witnesses or the production of documentary and other evidence.

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(6) Effect on State court proceedings

Nothing contained in this subsection shall be construed to prohibit an authorized State official from proceeding in State court on the basis of an alleged violation of any general civil or criminal statute of such State.

(7) Limitation

Whenever the Commission has instituted a civil action for violation of regulations prescribed under this section, no State may, during the pendency of such action instituted by the Commission, subsequently institute a civil action against any defendant named in the Commission's complaint for any violation as alleged in the Commission's complaint.

(8) "Attorney general" defined

As used in this subsection, the term "attorney general" means the chief legal officer of a State.

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(g) Junk Fax Enforcement report

The Commission shall submit an annual report to Congress regarding the enforcement during the past year of the provisions of this section relating to sending of unsolicited advertisements to telephone facsimile machines, which report shall include—

(1) the number of complaints received by the Commission during such year alleging that a consumer received an unsolicited advertisement via telephone facsimile machine in violation of the Commission's rules;

(2) the number of citations issued by the Commission pursuant to *section 503* of this title during the year to enforce any law, regulation, or policy relating to sending of unsolicited advertisements to telephone facsimile machines;

(3) the number of notices of apparent liability issued by the Commission pursuant to *section 503* of this title during the year to enforce any law, regulation, or policy relating to sending of unsolicited advertisements to telephone facsimile machines;

(4) for each notice referred to in paragraph (3)—

(A) the amount of the proposed forfeiture penalty involved;

(B) the person to whom the notice was issued;

(C) the length of time between the date on which the complaint was filed and the date on which the notice was issued; and

(D) the status of the proceeding;

(5) the number of final orders imposing forfeiture penalties issued pursuant to *section 503* of this title during the year to enforce any law, regulation, or policy relating to sending of unsolicited advertisements to telephone facsimile machines;

(6) for each forfeiture order referred to in paragraph (5)—

(A) the amount of the penalty imposed by the order;

(B) the person to whom the order was issued;

(C) whether the forfeiture penalty has been paid; and

(D) the amount paid;

(7) for each case in which a person has failed to pay a forfeiture penalty imposed by such a final order, whether the Commission referred such matter for recovery of the penalty; and

(8) for each case in which the Commission referred such an order for recovery—

(A) the number of days from the date the Commission issued such order to the date of such referral;

(B) whether an action has been commenced to recover the penalty, and if so, the number of days from the date the Commission referred such order for recovery to the date of such commencement; and

(C) whether the recovery action resulted in collection of any amount, and if so, the amount collected.

APPENDIX B

28 U.S.C. § 1658

§ 1658. Time limitations on the commencement of civil actions arising under Acts of Congress

(a) Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues.

(b) Notwithstanding subsection (a), a private right of action that involves a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws, as defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47)), may be brought not later than the earlier of—

(1) 2 years after the discovery of the facts constituting the violation; or

(2) 5 years after such violation.